



**Red and Yellow Outdoors Limited v Shiloah Investments Limited (Civil Application E017 of 2025) [2025] KECA 1874 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1874 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPLICATION E017 OF 2025  
MSA MAKHANDIA, HA OMONDI & P NYAMWEYA, JJA  
NOVEMBER 7, 2025**

**BETWEEN**

**RED AND YELLOW OUTDOORS LIMITED ..... APPLICANT**

**AND**

**SHILOAH INVESTMENTS LIMITED ..... RESPONDENT**

*(An application for stay of proceedings pending appeal from the Ruling of the Environment and Land Court at Kisumu (E. Asati J), dated 6<sup>th</sup> February 2024 in ELCLA/E108/2024)*

**RULING**

1. The applicant herein filed an application in this Court seeking to stay the proceedings of the Environment and Land Court at Kisumu (hereinafter “the ELC”), in ELCLA/E108/2024 pending the hearing of an appeal from a ruling delivered by the ELC (E. Asati J.) on 6<sup>th</sup> February 2025. The other prayers in the said application, which is brought by a Notice of Motion dated 17<sup>th</sup> February 2025, have been spent. The applicant had in this respect sought the following orders pending the hearing and determination of the application which were declined: an injunction restraining the respondent from interfering with its peaceful and quiet occupation of the suit premises at Kisumu Mega Plaza; an order that the respondent releases to the applicant all goods and tools of trade that it seized from the suit premises; an order that the respondent grants the applicant full access to suit premises; and an order that the OCS Kisumu Central Police station enforces compliance.
2. The application is supported by an affidavit of even date and a further affidavit dated 11<sup>th</sup> March 2025 sworn by Ben Ogombe Okeye, a director of the applicant. The applicant’s case in summary is that it was in a protected tenancy relationship with the respondent as the landlord; and on 27<sup>th</sup> July, 2024 the respondent gave the applicant 3 days’ notice to vacate the suit premises. The applicant thereupon filed a reference in the Business Premises Rent Tribunal (“BPRT”) to quash the eviction notice; and by a ruling dated 18<sup>th</sup> December, 2024 the BPRT allowed a preliminary objection by the respondent that



- the applicant was occupying an open space and not a shop, which suit premises do not form part of protected tenancies.
3. The applicant then filed an appeal in the ELC on 21<sup>st</sup> December 2024 seeking to overturn a ruling of the BPRT and that the ELC directs the BPRT to hear and determine the reference on its merits. In addition, the applicant filed two applications in the ELC, the first dated 21<sup>st</sup> December, 2024 seeking conservatory orders restraining the respondent from evicting it from the disputed premises; and the second dated 2<sup>nd</sup> January 2025, seeking orders to be granted access to the suit premises. The learned Judge of the ELC dismissed the two applications in the impugned ruling delivered on 6<sup>th</sup> February 2025 on the grounds that the agreement between the applicant and respondent had expired, and that the tenant had been removed from the premises by the time it applied for conservatory orders.
  4. The applicant is aggrieved by the said ruling and attached a draft memorandum of appeal to demonstrate that it has an arguable appeal, in which it states that the learned Judge erred in her findings on the existence of a protected tenancy and the processes that ought therefore to apply in termination of the tenancy. The applicant also averred that it stands to suffer an irreparable loss if the prayers sought are not granted; and that the respondent's use of the applicant's seized adverts and fixtures continues to occasion it monetary and other loss.
  5. The respondents opposed the application by way of a replying affidavit sworn on 27<sup>th</sup> February 2025 by Suku Elisha Shawin, the respondent's legal officer, and written submissions dated 17<sup>th</sup> March 2025. The respondent's case was that the agreements it entered into with the applicant were for a one (1) year term commencing on 1st August, 2023 and ending on 31st July, 2024, and had been terminated by effluxion of time. Further, that the applicant did not disclose to this Court that when it filed its application dated 21st December 2024, it had already been evicted from the subject spaces, and the respondent embarked on removing the applicant's equipment and paintings from its premises. Therefore, that the applicant has no arguable appeal, and if stay is not granted the appeal would not be rendered nugatory, as the applicant's remedies if any lie in damages which it can recover from the respondent. In any event, that the ELC and BPRT did not issue any positive orders that are capable of being stayed pending appeal; no purpose has been demonstrated that will be served by staying the proceedings in the ELC; and this Court is not seized of jurisdiction to issue some of the orders sought in the application at this stage of the proceedings, and which can only be granted after hearing of the substantive appeal.
  6. When the application came up for hearing on 26<sup>th</sup> May 2025 on this Court's virtual platform, learned counsel Dr. John Khaminwa appeared for the applicant, while learned counsel Mr. Wasunna, appeared for the respondent. Mr. Wasunna indicated that he had a preliminary issue to raise as regards this Court's jurisdiction, on the ground that section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* provides that appeals from the BPRT lie to the ELC and no further appeals are allowed from decisions of the ELC. Therefore, that this Court's jurisdiction is circumscribed by the statute, and it cannot hear any appeal or application arising from the decision of the ELC sitting as an appellate court from a decision of the BPRT. Mr. Wasunna therefore prayed that the instant application be struck out.
  7. In reply, Dr. Khaminwa termed the objection "a procedural objection", and submitted that *the Constitution* in Article 159 requires justice to be dispensed without regard to procedural technicalities. Dr. Khaminwa insisted that the applicant has a right of appeal under *the Constitution*, and where the interpretation of a law by the ELC is erroneous, then this Court's jurisdiction under *the Constitution* cannot be limited by a statute.



8. We have considered the objection on this Court’s jurisdiction, and we will need to address it first, as the outcome will determine if we can proceed to determine the merits of the application before us. Section 15 of the [Landlord and Tenant \(Shops, Hotels and Catering Establishments\) Act](#) provides as follows:

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“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.”

9. The Court of Appeal’s jurisdiction is set out in Article 164(3) of [the Constitution](#), which provides that the Court hears appeals firstly, from the High Court; and secondly, from any other court or tribunal as prescribed by an Act of Parliament. This jurisdiction is also reiterated in section 3(1) of the [Appellate Jurisdiction Act](#), which provides that the Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament, in cases in which an appeal lies to the Court of Appeal under law. [The Constitution](#) therefore envisages a situation where a statute may prescribe the jurisdiction of the Court of Appeal.

10. In addition, contrary to the submissions by Dr. Khaminwa, the issue raised as to whether we can hear the instant application in light of the provisions of section 15 is not a mere procedural objection, but is a substantive question that we must answer, in light of the decision by the Supreme Court of Kenya in *Samuel Macharia & another v Kenya Commercial Bank Limited & 2 others*, [2012] KESC 8 (KLR) that the question of a Court’s jurisdiction is not a mere procedural technicality, and that a court cannot assume jurisdiction where it has none. The Supreme Court in this regard opined as follows:

“68. 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.”

11. On the argument that a universal right of appeal is conferred by the provisions of Article 164(3) of *the Constitution*, and that a limitation of such a right hinders the right of access to justice, the Supreme Court of Kenya explained as follows in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch* [2019] KESC 11 (KLR) :

“ 33. What exactly does the term “jurisdiction” mean? In *Republic v Karisa Chengo & 2 others SC Petition No 5 of 2015; 2017 eKLR*, we defined jurisdiction as the “the Court’s power to entertain, hear and determine a dispute before it.” Also, “the sphere of the courts operations.” Is jurisdiction therefore synonymous with a right of appeal? In other words, does article 164(3) grant a litigant a right of appeal to the Court of Appeal? *Nyutu* urges that article 164(3) indeed grants such a right of appeal. We disagree. As urged by *Airtel*, this provision does not confer a right of appeal to any litigant. It only particularises the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal. There is thus no direct access to the Court of Appeal by all and sundry. As such, article 164(3) defines the extent of the powers of the Court of Appeal but does not grant a litigant an unfettered access to the Court of Appeal.”

12. The Supreme Court emphasized that a right of appeal is not automatic but a creation of the law, and is expressly conferred by *the Constitution* or a statute. It is notable in this respect that section 3 (1) of the *Appellate Jurisdiction Act* not only delineates this Court’s jurisdiction, but also states when a right of appeal lies to the Court. In the instant application, section 16 of the *Environment and Land Court Act* provides that appeals from the ELC shall lie to the Court of Appeal against any judgement, award, order or decree issued by the Court in accordance with Article 164(3) of *the Constitution*. However, as confirmed by the Supreme Court, Article 164(3) of *the Constitution* does not give an unfettered right of appeal, and also acknowledges that statutes can prescribe the right of appeal.
13. In this respect, section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* expressly denies the right of appeal from decisions of the ELC to this Court. It is notable that this situation is not unique to this application, since a number of statutes do limit the right of appeal to this Court. Indeed, the issue before the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch* (supra) involved the issue of whether there was a right to appeal to the Court of Appeal under section 35 as read together with section 10 of the *Arbitration Act*.
14. Lastly, by way of rationale, section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* is in the class of what are commonly referred to as finality clauses, and in our context, restricts second appeals from decisions of some tribunals and administrative bodies in the



interests of finality of disputes. The law in this respect provides for review mechanisms to address mistakes made by a final Court, including those alluded to by Dr. Khaminwa. This type of finality clauses are however distinguishable from ouster clauses, which completely oust judicial review and the courts' jurisdiction to challenge the decision of a Tribunal or administrative body, and which were the subject of the decision by the Supreme Court of Kenya in *Judges and Magistrates Vetting Board & 2 others v Centre for Human Rights and Democracy & 11 others* [2014] KESC 9 (KLR).

15. We accordingly find that the Notice of Motion application dated 17<sup>th</sup> February 2025 is incompetent, for the reason that the applicant has no right of appeal to this Court by dint of section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act. The said application is hereby struck out with no order as to costs, since the respondent raised the issue of jurisdiction for the first time during the hearing of the application.

16. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 7<sup>TH</sup> DAY OF NOVEMBER 2025.**

**ASIKE-MAKHANDIA.**

**JUDGE OF APPEAL**

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**H.A. OMONDI**

**JUDGE OF APPEAL**

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**P. NYAMWEYA.**

**JUDGE OF APPEAL**

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I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**

