



Mascarenhas & 2 others v Waithaka t/a Zegoko Enterprises (Environment and Land Appeal E162 of 2024) [2026] KEELC 599 (KLR) (30 January 2026) (Ruling)

Neutral citation: [2026] KEELC 599 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E162 OF 2024**

**TW MURIGI, J
JANUARY 30, 2026**

BETWEEN

**PRITI MASCARENHAS 1ST APPELLANT
HABITAT REALTORS INTERNATIONAL LTD 2ND APPELLANT
PYRAMID AUCTIONEERS 3RD APPELLANT**

AND

CHARLES GOKO WAITHAKA T/A ZEGOKO ENTERPRISES ... RESPONDENT

RULING

1. This ruling is in respect of the Notice of Preliminary Objection dated 14th February 2025, raised by the Respondent on the grounds that the court lacks jurisdiction to hear and determine the Memorandum of Appeal dated 2^{5th} November 2022.
2. The Respondent contends that the Appellant neither sought nor obtained leave to appeal from the Tribunal. It was further contended that the ruling and order being appealed do not fall within the category of orders from which an appeal lies as of right under Order 43 rule 1(1) of the *Civil Procedure Rules* and Section 75 of the *Civil Procedure Act*.
3. The Respondent argued that the impugned ruling is based on Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 3 and 3A of the *Civil Procedure Act*, and Articles 50(1) and 159 of the *Constitution of Kenya*, 2010.
4. In light of the foregoing, the Respondent asserts that this Court lacks jurisdiction to hear the appeal because leave to appeal was a prerequisite that was neither sought nor obtained before the appeal was filed.
5. The preliminary objection was canvassed by way of written submissions.



The Respondent Submissions

6. The Respondent filed its submissions dated 27th February 2025.
7. On behalf of the Respondent, Counsel outlined the following issues for the court's determination.
 - a) Whether the Appellant was required to seek leave before filing the appeal; and
 - b) Whether the Court lacks jurisdiction to hear and determine the appeal.
8. On the first issue, Counsel submitted that the Appellant was required to seek leave before filing the appeal since the proceedings before the Tribunal arose from a complaint, not a reference. Counsel distinguished between a reference under Sections 2 and 6 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* and a complaint as defined in Section 12 of the same Act.
9. Counsel further submitted that Section 15 of the *Act* confers a right of appeal as of right only in respect of decisions arising from a reference, and not from a complaint. To support this argument, reliance was placed on *Mike Muli v Justus Mwandikwa Kilonzo & 4 others* (2022) eKLR and *Republic v Principal Secretary, Ministry of Interior and Co-ordination of National Government & Attorney General Ex-Parte Simon Wainaina Mwaura* [2018] KEHC 9114 (KLR).
10. Counsel also cited Order 43 Rule 3 of the *Civil Procedure Rules*, which sets out the orders from which an appeal lies as of right. Counsel cited the decisions in *Simon Kalachv v Yuasa International Limited & another* [2021] eKLR and *Serephen Nyasani Menge v Rispah Onsase* [2018] KEELC 654 (KLR).
11. Regarding the second issue, Counsel maintained that this Court lacks jurisdiction to hear and determine the appeal because the prescribed procedure was not followed. Counsel urged the Court to put down its tools. Reliance was placed on the cases of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others*, (Civil Appeal 656 of 2022) (2023) KECA 80 (KLR).

The Appellants Submissions

12. The Appellants filed their submissions dated 28th June 2024.
13. On behalf of the Appellant, Counsel submitted that this Court has jurisdiction to hear the appeal as there exists an automatic right of appeal from any decision or order issued under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, regardless of whether it arises from a reference or a complaint. To support this argument, reliance was placed on *Ruth K. Wachira t/a Amigirl Beauty Palour v Chairman Business Rent Tribunal* [2006] eKLR.
14. Counsel further submitted that the ruling dated 28th October 2022 arose from the Respondent's application dated 21st July 2022, brought under Section 12(4) of the *Act* and seeking injunctive relief restraining the Appellant from levying distress for rent. Counsel refuted the Respondent's assertion that the application was filed under Order 51 Rule 1 of the *Civil Procedure Rules*, Sections 3 and 3A of the *Civil Procedure Act*, and Article 50 (1) and 159 of the *Constitution of Kenya* 2010.
15. Counsel contended that the impugned ruling and order fall within the ambit of Order 43 Rule 1(1) of the *Civil Procedure Rules*, and in the circumstances, no leave to appeal was required as the appeal lay as of right under the Act.



Analysis and Determination

16. The law on Preliminary Objections is well settled. A Preliminary Objection must be based on a pure point of law. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated;

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
17. In *Oraro v Mbaja* (2005) eKLR Ojwang J (as he then was) described it as follows: -

“I think the principle is abundantly clear. A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”
18. Having considered the preliminary objection and the rival submissions, the sole issue for determination is whether this court is vested with the requisite jurisdiction to hear and determine this appeal.
19. It is trite law that jurisdiction is everything, and without it, the court cannot take any further step in the matter. The locus classicus on jurisdiction is the celebrated case of *Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited* (1989) eKLR, in which the Court held as follows:

“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...”
20. Similarly, the Supreme Court in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012] eKLR pronounced itself as follows;

“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. 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....”
21. A court derives its jurisdiction from the Constitution, legislation, or both. The jurisdiction of this court is derived from Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act.
22. The Respondent argued that the impugned ruling and order do not confer a right of appeal as of right, as they stem from proceedings under Section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act.



23. The Appellant, on the other hand, contended that the impugned ruling arose from an application brought under Section 12(4) of the *Act* and falls within the ambit of Order 43, Rule 1(1) of the *Civil Procedure Rules*, and that no leave to appeal was therefore required.
24. This court has jurisdiction to hear and determine appeals from tribunals, subordinate courts, or other bodies exercising jurisdiction over disputes contemplated under Article 162(2)(b) of the *Constitution*, provided that such appellate jurisdiction is conferred by statute.
25. A party lodging an appeal must demonstrate the legal basis for the appeal, including whether the right of appeal exists as of right or whether leave was required and obtained. This position was articulated by the Court of Appeal in *Nyutu Agrovet Limited v Airtel Networks Limited* [2015] KECA 1012 (KLR), where the Court stated:

“The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this Court. To me, even if jurisdiction and the right of appeal may be referred to side by side or in the same breath, the two terms do not mean one and the same thing. It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law then that court has no business to entertain the matter... This Court has jurisdiction to hear any matters coming on appeal from the High Court and any other court or tribunal prescribed by law. But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal before us. However, be it appreciated that such leave does not constitute the right to appeal. The right must precede leave.”

26. The appeal before this Court arises from a ruling delivered on 28th October 2022 in Business Premises and Rent Tribunal Case No. E649 of 2022. The ruling arose from an application dated 21st July 2021 brought under Section 12(1)(h) and 12(4) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. The Respondent sought injunctive orders restraining the Appellants from levying distress, removing goods from the premises, and harassing or evicting the Respondent pending the determination of the reference. The Tribunal allowed the application and issued directions for the hearing of the main suit, which is a reference.
27. Under Section 6 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, a reference is defined as follows:
 - (1) 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.
28. Under Section 12(1) (h) of the *Act*, the Tribunal is empowered to take all actions necessary to exercise its jurisdiction, including allowing the levy of distress for rent. Section 12(4) further empowers the



Tribunal to investigate complaints relating to controlled tenancies, which may be filed by either a landlord or a tenant.

29. Although the Appellant invoked Order 43 Rule 1(1) of the *Civil Procedure Rules*, it is important to underscore that the right of appeal from the Business Premises Rent Tribunal is primarily governed by Section 15 of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, which provides as follows:

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. (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.

30. Courts have interpreted Section 15 to limit the right of appeal to parties to a reference, and not to parties pursuing a complaint under Section 12(4). In *Re-Heptulla Properties Ltd* (1979) eKLR, the court observed as follows.

“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 ...”.

31. The Court of Appeal reaffirmed this position in *Gatanga General Store & 2 Others v Githere* (1988) eKLR, holding that orders arising from proceedings under section 12(4) are not appealable:

“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 the 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 the 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.

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

32. The Appellants relied on *Ruth K. Wachira t/a Amigirl Beauty Palour v Chairman Business Rent Tribunal* [2006] KEHC 3092 (KLR), in which the High Court adopted a broader interpretation of the term “reference” to include complaints under Section 12(4) and held that an appeal lay from any determination or order of the Tribunal.
33. While mindful of the divergence in the foregoing opinions, this Court finds that the circumstances of the present case are distinguishable. The proceedings that gave rise to the impugned ruling were not independent complaints but interlocutory proceedings within an existing reference, namely Tribunal Case No. E649 of 2022.
34. The relief sought was ancillary to and intended to preserve the subject matter pending the determination of the reference. The Tribunal treated the application as part of the reference and issued directions for the hearing of the main suit. The parties to the application were therefore parties to a reference within the meaning of Section 15 of the *Act*.
35. In these circumstances, the Appellants possessed an automatic right of appeal and were not obliged to seek leave prior to approaching this Court.
36. In light of the foregoing, I find that the Preliminary Objection is without merit and is therefore dismissed with costs to the Appellants.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF JANUARY, 2026.

T. MURIGI

JUDGE

In the presence of:-

Absence of the parties

Ahmed – Court Assistant

