



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT ELDORET**

**PETITION NO. 12 OF 2018**

**IN THE MATTER OF: ARTICLE 10,48 AND 50 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 10,48 AND 50 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF: ELDORET BPRT, CASE NO. 18 OF 2017 SAMWEL NDERITU & ANTONY MBOGO T/A BUFFALO AUTO LAB =VS= STRATEGIC ENTREPRENEURS LIMITED.**

**AND**

**IN THE MATTER OF: RULE 4 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURES RULES 2013.**

**AND**

**IN THE MATTER OF: THE DECISION OF THE TRIBUNAL MADE ON THE 13TH OCTOBER 2017 AND 7TH SEPTEMBER 2018.**

**AND**

**IN THE MATTER OF: IN THE MATTER OF RIGHT OF APPEAL ON A COMPLAINT**

**BETWEEN**

**SAMWEL NDERITU & ANTONY MBOGO**

**T/A BUFFALO AUTO LAB PETITIONERS.....PETITIONER**

**VERSUS**

**STRATEGIC ENTREPRENEURS LIMITED.....1<sup>ST</sup> RESPONDENT**

**THE BUSINESS PREMISES RENT TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE LAW SOCIETY OF KENYA.....INTERESTED PARTY**

**RULING**

This ruling is in respect of a Notice of a Preliminary objection dated 3<sup>rd</sup> February 2019 by the 1<sup>st</sup> respondent on the grounds that:

- a) THAT the issues canvassed in support of the said petition are *Res judicata* the same having been directly and substantially in issue between, inter-alia, the same parties herein in Eldoret BPRT Case No.18 of 2017.
- b) THAT if the petitioners were aggrieved by the decision of the Tribunal made on the 13<sup>th</sup> October, 2017 and 7<sup>th</sup> September, 2018 they ought to have appealed against the same by virtue of section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act, Cap.301.

The petitioner filed this petition contemporaneously with a notice of motion dated 21<sup>st</sup> September 2018 under certificate of urgency seeking for stay of execution of the orders in Eldoret BPRT No. 18 of 2017 whereby the court certified the matter as urgent and directed that the applicant serves the application for inter partes hearing within 7 days.

The applicant later amended the petition and filed a notice of withdrawal of the notice of motion dated 25<sup>th</sup> September 2018 in its entirety. The 1<sup>st</sup> respondent later filed the current notice of preliminary objection. Counsel therefore agreed to canvass the preliminary objection by way of written submissions which they did.

### **1<sup>ST</sup> RESPONDENT'S SUBMISSIONS**

Counsel for the 1<sup>st</sup> respondent gave a background to the petition stating that on 22<sup>nd</sup> March 2017 the Petitioner's approached the Business Premises And Rent Tribunal vide a reference herein ELDORET BUSINESS PREMISES AND RENT TRIBUNAL CASE 18 OF 2017(Samwel Nderitu and Antony Mbogo T/A Buffalo Auto Lab —vs-Strategic Entrepreneurs Limited together with an Application seeking prohibitory orders to restrain the 1<sup>st</sup> Respondent/Landlord from evicting the Petitioners from the business premises located within ELDORET MUNICIPALITY / BLOCK 3/30 pursuant Section 12 of the Landlord AND Tenant (Shops,Hotels and Catering Establishments)Act Cap 301.

Counsel submitted that the 2<sup>nd</sup> Respondent considered the said Application ex-parte in the first instance and granted interim relief on the 22<sup>nd</sup> March 2017 and scheduled the hearing of the Application for the 2<sup>nd</sup> May 2017 of which the 1<sup>st</sup> Respondent, upon service entered appearance and filed a response to the Petitioner's Application vide the Replying Affidavit dated 19<sup>th</sup> April 2017 in opposition to the Application while claiming Ksh. 260,000.00 /= being the outstanding rent and goodwill arrears.

It was Counsel's submission that each party was afforded a fair hearing by the 2<sup>nd</sup> Respondent and upon full hearing the 2<sup>nd</sup> Respondent delivered its ruling on 13<sup>th</sup> October 2017 in the following terms:

- (a) The Landlord herein the 1<sup>st</sup> Respondent be restrained from evicting the Petitioners and or terminating the tenancy without compliance with the provision of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301.
- (b) The Orders issued on 22<sup>nd</sup> March 2017 varied to the extent that the landlord/ 1<sup>st</sup> Respondent was allowed to levy distress and recover all outstanding arrears and goodwill if the Tenant/Petitioner does not pay the same on or before 31<sup>st</sup> December 2017.
- (c) Each party was to bear its own costs of the Application.

Counsel for the 1<sup>st</sup> respondent submitted that the Petitioner was aggrieved by the said ruling of the 2<sup>nd</sup> Respondent but did not Appeal against the same as provided by **Section 15 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act Cap 301.**

Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) 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.*

Counsel submitted that the Petitioner in total abuse of the equity, court process and the laid down rules slept on their rights for over 11 months after the 2<sup>nd</sup> Respondent delivered its ruling on 13<sup>th</sup> October 2017. That the petitioner further filed an application dated 3<sup>rd</sup> September 2018 which was heard and determined by the 2<sup>nd</sup> Respondent vide its ruling delivered on 7<sup>th</sup> September 2018.

Counsel further submitted that the entire amended Petition dated 19<sup>th</sup> October, 2018 raises issues that had been directly and substantially in issue between, inter alia, the same parties herein in ELDORET BPRT CASE NO.18 OF 2017 the same having been heard and determined and no appeal was preferred is *res judicata* and an abuse of the court process therefore using a backdoor to appeal against the judgment.

Counsel listed the following issues for determination

- a) Whether the Petitioner's Amended Petition is *res judicata* as it raises issues that were directly and substantially dealt with in issue between, inter alia, the same parties herein in ELDORET BPRT CASE NO. 18 OF 2017.
- b) Whether there was an Appeal against the Order dated 13<sup>th</sup> October 2017 as provided by Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments)
- c) Whether the Petitioners/ Applicants' Application and the entire petition is misconceived, frivolous, totally devoid of merit and mala fides.

On the first issue whether the Petitioners Amended Petition is *res judicata* as it raises issues that were directly and substantially dealt with in issue between, inter alia, the same parties herein in ELDORET BPRT CASE NO. 18 OF 2017., Counsel relied on section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) 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.*

It was Counsel's submission that if the Petitioners were aggrieved by the decision of the Tribunal made on the 13<sup>th</sup> October, 2017 and 7<sup>th</sup> September, 2018, they ought to have appealed against the same which they never did hence the amended petition is res judicata as issues having been heard are directly and substantially in issue between, the same parties herein in ELDORET BPRT CASE NO. 18 OF 2017.

Counsel further submitted that this petition is an attempt to appeal the judgment of the tribunal unprocedurally. Counsel cited Eldoret ELC NO. 459 OF 2013 **Elkana Kibingor v Charles Kipkoeh Tallam & 4 others [2019] eKLR** where the court while delivering the judgement quoted the Court of Appeal in the case of John Florence Maritime Services Limited & Ano. Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KIR in which the rationale behind res judicata as outlined in Henderson Vs Henderson (1843) 67 ER 313:

*"...the rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court's limited resources and timely determination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law."*

Counsel further submitted that the court went ahead and stated that :

*"I find that the issues in this case were dealt with by a competent court and no appeal was preferred therefore the judgment is still valid. The attempt to bring other issues ... which the plaintiff claims is a backdoor way of appealing against the judgment."*

On the issue as to whether there was an Appeal against the Ruling dated 31<sup>st</sup> October 2017 and 7<sup>th</sup> September 2018 as provided by Section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Counsel submitted that there was no appeal and as such it is a way of filing an appeal through the backdoor and therefore an abuse of court process.

Counsel therefore urged the court to uphold the preliminary objection and dismiss the petition with costs.

#### **PETITIONER'S SUBMISSION**

Counsel for the petitioner filed submissions in opposition to the preliminary objection by the 1<sup>st</sup> respondent and gave a brief background to the case. Counsel submitted that the petitioners have invoked the jurisdiction of the court as a the supervisory jurisdiction of a superior court over a local Tribunal. Counsel cited the case of **Awali Tumaini Investment Limited v Engen Kenya Limited & Another, 2018 eKLR** in which Justice Tuiyot held;

**"The supervisory jurisdiction over the Business premises Tribunal is exercised by the Environment and Land Court. It's clear to me that this court is bereft of jurisdiction and power (that flows from jurisdiction) to set aside the order of the Business premises Tribunal in case number 678 of 2018."**

Counsel submitted that the petitioners are thus not asking this Honourable court to try the dispute between the parties before the Tribunal; but to exercise the supervisory jurisdiction and further that the petitioners have prayed for an order of certiorari over the decisions of the Tribunal. The power to grant the said relief is provided for in section 13 (7) (b) of the Environment and Land Court Act, 2011. The power to grant the declarations sought is provided for in section 13 (7) (h) of the said Act too. Counsel further submitted that the objection is misplaced as the petitioners in moving this court raised the issue that no right of appeal existed over a complaint as opposed to a reference under the law. The petitioners' amongst relief have sought a declaration on the constitutional validity of section 15 (1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Acts Cap, 301.

An examination of the said provision clearly reveals that an appeal can only be lodged when a party has filed a reference. The same provides in part;

**"Any party to a reference aggrieved..."**

Counsel further submitted that the issue of the non - existence of a right of appeal being confined to references as opposed to complaints has been the subject of judicial finding in the case of **Re. Hebtulla Properties Ltd, (1979) KLR 96** in which Justice Simpson as he then was held;

*"The right of appeal to the High Court conferred by section 15 (1) from an order or determination of a Tribunal on a reference to it does not extend to an order of the Tribunal made on a complaint."*

He observed;

*"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 on a reference."*

Counsel also cited the case of **Silas Yimbo T/ A. Woodvale Associates v Eldomart Holdings Limited, (2008) eKLR Justice Alnasir Visram** as he then was observed;

*"On my part I will stick to the conventional wisdom and hold that if the legislature had intended a right of appeal from decisions of the Tribunal in respect of complaints made under section 12 (4) of the Act, it would have said so clearly and Would not have amended the Act as it did in 1970. Accordingly, I find that this appeal is incompetently before the High Court and strike the same out with costs to the Respondent. "*

Counsel finally relied on the case of **Francis Komu Gitau T/ A. Bomas Motormart v Mohamed Nyaoga & 2 others, (2013) eKLR Justice D. A. Onyancha** as he then was observed;

*"In this case, as earlier found there was no dispute as to what was filed before the Tribunal since both sides and the court defined it as a "complaint". The Tribunal struck out the Tenant's*

*"complaint" and notice of motion on the basis that it had no jurisdiction to hear and determine the same since no controlled tenancy was revealed or demonstrated by the Tenants facts and pleadings. The tenant promptly appealed to this court. The respondent argued that in view of the fact that it was a "complaint" that was struck out by the Tribunal, there was no right of appeal. I have carefully considered the preliminary objection above. In the face of the exposition of the law herein above, the facts above clearly demonstrate that the Appellant applicant herein had no right of appeal to this court because the matter determined by the Tribunal was a "complaint".*

*That is to say that this appeal and any application under it, are fatally incompetent. They are here by struck out with costs to the respondent. "*

Counsel therefore prayed that the preliminary objection be dismissed with costs to the petitioner.

#### **INTERESTED PARTY'S SUBMISSIONS IN SUPPORT OF THE 1<sup>ST</sup> RESPONDENT'S PRELIMINARY OBJECTION DATED 3/02/2019**

Counsel for the interested party supported the preliminary objection on the grounds that the petition is res judicata as ELDORET BPRT CASE NO. 18 OF 2017 was determined on its merits on 13<sup>th</sup> October 2017 and 7<sup>th</sup> September 2018. Further that the Petitioners have not appealed against the orders issued by the 2<sup>nd</sup> Respondent in ELDORET BPRT CASE NO. 18 OF 2017 on 13<sup>th</sup> October 2017 and 7<sup>th</sup> September 2018 as provided under Section 15 of Landlord and Tenants (Shops, Hotel and Catering Establishments) Act which states:-

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 High Court: Provided that the High 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 High Court shall govern appeals under this Act: Provided that the decision of the High Court on any appeal under this Act shall be final and shall not be subject to further appeal.**

Counsel submitted that the orders of the 2<sup>nd</sup> Respondent have not been quashed by any court of law as there was no appeal lodged to the High Court. Further that the orders sought and the issues raised by the Petitioners in the Amended Petition 19<sup>th</sup> October 2018 are similar to the ones sought in ELDORET BPRT CASE NO. 18 OF 2017 by the same parties. Section 7 of the Civil Procedure Act provides:

*"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally by such court. "*

Counsel cited the case of **Attorney General & another vs ET (2012) eKLR** where it was held that;

*"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit". In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi I-ICC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some*

*cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judica.*

Mr. Yego submitted that this petition is an abuse of the court process as it seeks to circumvent orders lawfully issued in ELDORET BPRT CASE NO. 18 OF 2017 through the back door. That the essence of the principles of res-judicata is to not only protect the courts from disrepute, but also to protect litigants from unending litigation. Counsel therefore urged the court to uphold the preliminary objection by the 1<sup>st</sup> respondent with costs

### **ANALYSIS AND DETERMINATION**

This is a preliminary objection on the grounds that the petition is res judicata. The principles governing preliminary objections are now well settled as per the Mukisa Biscuit case where the issues raised must be purely on law and not fact. If a court has to look outside the case to establish a fact or call any evidence then that is not a case for preliminary objection.

The issue of res judicata is a doctrine of law which is provided for under the Kenyan law at Section 7 of the Civil Procedure Act which provides:

*"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or*

*between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally by such court. "*

Litigation must come to an end and parties should not be allowed to abuse the court process by trying to reinvent themselves and camouflage as new parties in different colours, shapes and style. We are aware that even company's veils can be lifted when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime the law will regard the company as an association of persons. This is just an analogy of parties coming up with the same issues that have been adjudicated upon by a competent court or tribunal to state that they are now seeking for declaratory orders.

The submissions of all Counsel gave a highlight of what transpired at the tribunal which indicate that the matter was fully adjudicated upon. The authorities cited by the petitioner to buttress the case are in essence in support of the upholding of the preliminary objection. I am of the view that if Parliament wanted to include complaints to be granted the same latitude of appeal as references then the same should have been made clear. There is a reason why complaints were not accorded the same right.

This is a case where the petitioner is being used as a test case to test the waters and hang on so as the respondents do not proceed with execution. The courts should not be used as a place to delay implementation or court judgments by litigants. I find that this petition is res judicata and an abuse of the court process and therefore the preliminary objection is upheld and the petition dismissed with costs to the respondents and the interested party.

**DATED and DELIVERED at ELDORET this 24<sup>TH</sup> DAY OF OCTOBER, 2019.**

***M. A. ODENY***

***JUDGE***

**RULING** read in open court in the presence of

Mr.Ngugi holding brief for Mr.Misoi for 1<sup>st</sup> Respondent and in the absence of Mr.Kigamwa for Petitioner and Mr.Yego for interested Party.

Mr.Mwelem – Court Assistant