



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC APPEAL CASE NO 5 OF 2018**

**KENNETH NJOROGE NDUMBI..... APPLICANT**

**VERSUS**

**KAVORE KARIUKI.....RESPONDENT**

**RULING**

1. On 21/9/2018, the respondent brought a notice of preliminary objection seeking to have this appeal struck out on the following grounds:
  - 1) *The appeal is not properly before the court as there was no right of appeal in relation to the orders purportedly appealed from.*
  - 2) *This court has no jurisdiction to entertain the purported appeal.*
  - 3) *The Landlord and Tenants (Shops, Hotels & Catering Establishments) Act, Cap 301 of the Laws of Kenya, has very limited instances of appeal and the present appeal does not fall amongst those allowed.*
  - 4) *The ruling and order purportedly appealed from have not been availed and this court is being asked to give orders while in the dark.*
  - 5) *The orders sought by their nature and effect seek to set aside the High Court decision in Kiambu Judicial Review Case No. 7 of 2016 that directed that the orders of the tribunal to remain in force.*
2. On 27/9/2018, by consent, parties to the appeal agreed that the preliminary objection would be disposed before any other pending matter is dealt with. I directed that the parties file written submissions on the preliminary objection.
3. The appellant filed his submissions on 20/6/2019. He submitted that this court had the jurisdiction to hear and determine the appeal as provided under Section 15 (1) of the Landlord and Tenant (Shops, Hotels & Catering Establishments) Act. He added that the said Section allowed an aggrieved party to file an appeal within 30 days at the Environment and Land Court. He also submitted that this court had appellate jurisdiction over the decisions of the subordinate courts and local tribunals by dint of the provisions of Article 162(4) of the Constitution. Reference was placed on Section 13 (1) of the Environment and Land Court Act which vests in this court the jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the Constitution of Kenya. The appellant further submitted that the preliminary objection was premature and misconceived because this court had the jurisdiction to hear appeals from the Tribunal. Reliance was placed on **Real Consult Agencies Ltd v Gerald Wachira Nguthi [2016]eKLR**.
4. The respondent filed his submissions on 1/3/2019. It was his submission that this court did not have the jurisdiction to determine this appeal because it did not arise from a reference. He submitted that jurisdiction is everything and without it, the court had no power to make one more step. Reliance was placed on **Owners of Motor Vessel 'Lilian S'v Caltex Oil (K) Ltd [1989]KLR 1 and Edith Wairimu Njoroge v Brooks Holdings Co. Limited and another**. He further submitted that jurisdiction is donated by statute and the right of appeal is a jurisdictional imperative. Reliance was placed on **Kakuta Maimai and 2 others v Peris Pesi Tobiko and 2 others**. The respondent added that the appeal herein was incompetent because it was lodged without any constitutional or statutory backing.
5. I have considered the grounds set out in the notice of preliminary objection. I have also considered the parties' rival submissions. Similarly, I have considered the relevant legal framework and jurisprudence. Two key issues fall for determination in the preliminary objection. The first issue is whether this court lacks jurisdiction to entertain the appeal herein. The second issue is whether the appeal herein is fatally defective on account of the appellant's failure to annex a copy of the order appealed against.
6. The broad appellate jurisdiction of this court is set out in Section 13(4) of the Environment and Land Court Act which provides as follows:

### **13. Jurisdiction of the Court**

**(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.**

7. The Court's specific jurisdiction in relation to the determinations and orders made in a reference are set out in Section 15 (1) of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act. It provides as follows:

### **15. 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 nor 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.**

8. The preliminary objection under consideration was filed before the appellant filed the record of appeal. Neither the record of appeal nor the preceding filings contain the pleadings through which Thika BPRT No 15 of 2016 was initiated. Consequently, it is not clear whether the impugned orders were made in a reference or in proceedings which were not a reference within the meaning of the Act. In the absence of evidence relating to the instrument through which Thika BPRT No 15 of 2016 was initiated, this court is not able to conclusively determine that it lacks jurisdiction to entertain this appeal.

9. It is not clear why the objector chose to canvass the issue of jurisdiction through the forum of a notice of preliminary objection when in fact the issue he is canvassing requires clear evidence indicating that the cause in which the impugned decision was made was not a reference within the meaning of Section 15 of the Landlord and Tenant (Shops, Hotels & Catering Establishment) Act. A formal application with a supporting affidavit and annexures of pleadings would have been an ideal platform. This court cannot speculate or lock out a litigant on the basis of speculation. It is incumbent upon the respondent to bring a proper motion supported with evidence, to enable the court make an informed decision.

10. Consequently, the first limb of the preliminary objection is declined at this point. The respondent is, however, at liberty to bring a proper motion to demonstrate that this court lacks jurisdiction to entertain this appeal.

11. The second issue is whether this appeal is fatally incompetent by dint of the fact that the order appealed against was not availed to the court. There is no mandatory legal requirement that the impugned order or judgment be availed to the court at the time of lodging an appeal. Under the prevailing rules of this court, a duly signed and dated memorandum of appeal is a sufficient instrument for the purpose of initiating an appeal. The complete record of appeal would properly be filed after the memorandum of appeal has been lodged as a lone document. It is therefore my finding that the second limb of the respondent's objection lacks merit and is rejected.

12. The net result is that the preliminary objection contained in the notice of preliminary objection dated 21/9/2018 is rejected at this point. The respondent is nonetheless at liberty to bring a formal motion and canvass the issue of jurisdiction.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF OCTOBER 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Waweru holding brief for Thuita for the respondent

Court Clerk - June Nafula