Nderi v Zubedi & another (Environment and Land Appeal E038 of 2023) [2025] KEELC 822 (KLR) (26 February 2025) (Judgment)

Neutral citation: [2025] KEELC 822 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E038 OF 2023

SM KIBUNJA, J

FEBRUARY 26, 2025

BETWEEN

SUSAN NJOKI NDERI ..... APPELLANT

AND

SHEIKHA ABED AWADH ZUBEDI ..... 1ST RESPONDENT

ANNA NYAMBURA WAINAINA ..... 2ND RESPONDENT

JUDGMENT

1. This appeal was commenced through the memorandum of appeal dated the November 6, 2023, raising six grounds against a judgement and order of Hon. Gakuhi Chege in Business Premises Rent Tribunal Case No. 244 of 2019 Susan Njoki Nderi versus Sheikh Abed Zubedi & Anna Nyambura Wainaina delivered on 13th October 2023. The appeal is premised on the following grounds:

    1. ”The learned Deputy Chairman erred in law and fact in holding that the Business Premises Rent Tribunal had no jurisdiction over the appellant’s Complaint dated 13th September, 2019.

    2. The learned Deputy Chairman erred in law and fact in holding that it had no jurisdiction over the cause of action before him without considering that the issue of jurisdiction had been raised by the Respondents and dismissed, and therefore the same was res-judicata.

    3. The learned Deputy Chairman erred in law and fact in accepting and/or admitting that a contemptuous act of a party during a proceeding of a matter competently instituted can take away the court’s jurisdiction.

    4. The learned Deputy Chairman erred in law and fact in holding that there was no tenancy relationship between the appellant and the Respondents, while the 1st Respondent is still

holding the appellant's business items, thereby creating an inference of an existence of tenancy between them.

5. The learned Deputy Chairman erred in law and fact by allowing the Respondents to benefit from their own illegal and mischievous conduct in open and flagrant disobedience of the Orders of the Tribunal.

6. The learned Deputy Chairman erred in law and fact in holding that the Business Premises Rent Tribunal has no power to reinstate a tenant."

The appellant seeks for the orders that the appeal be allowed; order dismissing the complaint dated 13th September 2019 be set aside; appellant's complaint dated 13th September 2019 be allowed and for costs in this appeal and tribunal to be borne by the respondents jointly and severally.

2. The 1st respondent filed the notice of preliminary objection dated the 12th October 2024 raising the ground that the proceedings are defective for being in contravention of section 15(1) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) chapter 301 of Laws of Kenya, the Act.

3. Briefly restated, the 1st respondent had leased the suit premises to the 2nd respondent on the 1st January 2015, who then sublet it to the appellant on 4th August 2015. The appellant operated a business there from August 2015 upon paying a goodwill of Kshs.850,000 for four years. The 1st respondent issued a termination notice to the 2nd respondent on 8th August 2019 on the ground that she had sublet the premises without this consent. Thereafter the respondents entered into a consent on 7th September 2019 to the effect that she would give vacant possession. The appellant instituted a complaint dated the 13th September 2019 to the tribunal seeking for inter alia orders for 1st respondent to open the suit premises and allow her take possession; prohibitory order restraining respondents from interfering with her possession of the premises and compensation for loss of business. The tribunal heard the complaint culminating with their decision subject matter of this appeal. The appellant and the 1st respondent were the only two witnesses who testified and the tribunal rendered a judgment on 13th October 2023. From the said judgement, the tribunal found inter alia that it was lacking jurisdiction under section 12 (e), for reasons that the appellant was not in possession of the premises and had no direct tenancy relationship with the 1st respondent. The 1st respondent claimed that he did not give consent to the 2nd respondent to enter into a sub-tenancy agreement with the appellant.

4. On the 15th October 2024, the learned counsel agreed to have the appeal and the preliminary objection canvassed together through written submissions. The learned counsel for the appellant filed two sets of submissions dated the 18th December 2024, while that for the 1st respondent filed theirs dated 2nd December 2024 and 24th January 2025, which the court has considered.

5. The issues for determinations by the court are as follows:

   a. Whether the ground on the notice of preliminary objection raises a pure point of law that if upheld, could determine the appeal herein.

   b. Whether the appellant has established any of the grounds of appeal.

   c. Who pays the costs?

6. The court has carefully considered the grounds on the memorandum of appeal and preliminary objection, record of appeal, submissions by both counsel, superior courts decisions cited thereon and come to the following determinations:

   a. It is trite law that where a preliminary objection is raised, then it has to be determined first, as it has the potential of determining the suit even before it has been heard. In the case of Mukisa

Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd [1969) EA 696, the court held that:

> " .... 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 a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.....
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> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...."

The 1st respondent's preliminary objection is predicated on section 15 of the Act, and counsel has inter alia submitted that the appellant was without the right to appeal over the tribunal decision of 13th October 2023 over her complaint dated 13th September 2023, and the court therefore is without jurisdiction. The learned counsel cited the decision in the case of Nyutu Agrovet Limited versus Airtel Networks Limited [2015] eKLR, where it was held that:

> " 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."

b. That section 15(1) of the Act provides that:

> " 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."

The counsel submitted the above provision is limited to right of appeal over the decision of the tribunal on a reference, and not on decisions over anything else. The counsel submitted on the definition of a "reference" under section 2 of the Act that states:

> " reference" means a reference to a Tribunal under section 6 of this Act."

And section 6 of the Act provides as follows:

> " 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 th 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."

The learned counsel submitted that tenancy notices are issued by a landlord under section 4(2) of the Act to the tenant who then files a reference under section 6 of the said Act, if they intend to oppose the same.

c. That as there was no notice issued to terminate the tenancy in this case, then the filing of this appeal was in contravention of section 15(1) of the Act. That what the appellant had filed before the tribunal was a complaint pursuant to section 12(4) of the Act, which provides that:

> " In addition to any other powers specifically conferred on it by or under this Act, a Tribunal may investigate any complaint relating to a controlled tenancy made to it by the landlord or tenant, and may make such order thereon as it deems fit."

d. In the case of RE HEBTULLA PROPERTIES LTD (1979) eKLR, the court held that:

> " 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."

In that case, the court proceeded to hold that it lacked the appellate jurisdiction to preside over an appeal against the decision of the Tribunal on a complaint. The court in the above case had taken a literal approach in limiting the jurisdiction of the High Court, and relied on the decision in the case of Choitram versus Mystery Model Hair Saloon, [1972] EA 52 where it was observed that before the amendment on 6th April 1970, the Landlord and Tenant (Shops, Hotels and Catering Establishments), appeals were then preferred before the Senior Resident Magistrates courts, with a further appeal to the High court only on questions of law or mixed facts and law.

e. In the case of Ex Parte Mayfair Bakeries Limited versus Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981 it was held that:

> " Where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature.....It is recognised that each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration."

And in the case of Transallied Limited versus Sakai Trading Limited [2016] KEELC 158 (KLR) the court held that:

> "Independently of the decision of Angawa J, we have also considered the issue. With due difference to the decision of Simpson J. in the case of Re Hebatulla Properties Ltd. (Supra), we do not agree with the restricted interpretation which he gave to the word "reference" in Section 15(1) of the Act. The term reference is defined in Section 2 of the Act to mean "reference to a Tribunal under Section 6 of the Act." For appeal purposes, we do not think that the term reference can be restricted only to reference to the tribunal under Section 6 of the Act. We are of the view that if that was the intention of the legislature, it would have stated so expressly in section 15(1) of the Act. Looking at the Act as a whole together with the regulations made thereunder, we have observed that reference can be made to the tribunal under section 6(1) of the said Act or under Section 12 (4) of the Act and the forms for instituting a reference in both cases are provided for in the regulations. See, Regulation 5 of the Landlord and Tenant (Shops, Hotels and Catering Establishments)Tribunal Forms and ProcedureRegulations. Under Regulation 5 aforesaid as read together with Form C in the Schedule to the said

> Regulations, a complaint by a landlord or a tenant is lodged in the tribunal as a "reference." A party to a complaint is therefore a party to a "reference" and should be covered under Section 15(1) of the Act. The Act having expressly given a right of appeal to "any party" to a reference, we can find no reason why we should restrict such parties only to those whose reference was brought pursuant to Section 6 of the Act in the absence of express provisions to that effect.

This being a superior court, its jurisdiction cannot be ousted by implication. In the case of Gatimu Kinguru Vs. Muya Gathangi (1976 – 80) I KLR 317, Madam J. stated as follows at page 331;

> "In interpreting a statute, in the absence of an express provision to that effect, it is always wrong for the court to whittle down the rights and privileges, of the subject. The Court's task is to protect the rights and privileges of the people, not to chip and shear them."

Further, in the case of East African Railways Corporation versuss. Anthony Sefu Dar –es-Salaam,(HCCA No. 19 of 1971) (1983) E. A 327, it was held that:

> " A statute cannot be construed to oust the jurisdiction of a superior court in the absence of clear and unambiguous language to that effect."

f. Section 3 (1) of the *Judicature Act* provides as follows:

> " The jurisdiction of the Supreme Court, the Court of Appeal, the High Court, the Environment and Land Court, the Employment and Labour Relations Court and of all subordinate courts shall be exercised in conformity with—
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> (a) *the Constitution*;
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> (b) subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;
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> (c) subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date:
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> Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

With the foregoing provision in mind, the coming into being of the this court, and the enactment of the *Environment and Land Court Act* No. 19 of 2011, I am of the view that the

legal position as captured in the cases of Choitram and Re Hebtulla [supra], has since changed to the new dawn or reality. Section 16A of the *Environment and Land Court Act* provides that:

> " All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the *Environment and Land Court Act*, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order."

The purposive interpretation approach of the above provision would be that the drafters of the legislation were aware of the holding in those two cases. They intended to specifically provide for this section in the manner it is to replace the hitherto existing legal position restated in the cases of Choitram and Re Hebtulla [supra].

g. For the foregoing reasons, it is my finding that a determination of a complaint referred to the tribunal under section 12 (4) of the Act is appealable to this court under Section 15 (1) of the Act. Flowing from the above findings, the 1st respondent's objection to the appeal herein on the ground that the appellant did not have a right of appeal is rejected. This court has jurisdiction under section 16A of the *Environment and Land Court Act* to hear and determine this appeal, that I will now proceed to determine as hereunder.

h. The responsibility or obligation of a first appellate court was captured in the case of Paramount Bank Limited versus First National Bank Limited & 2 others [2023] KECA 1424 (KLR) the Court of Appeal stating that:

> " A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion."

The main ground upon which the appellant's appeal is based is that the tribunal erred in finding it did not have jurisdiction to determine the appellant's complaint/reference on her eviction from the suit premises. The tribunal relied on the decisions on several superior court cases including Re Hebtulla case [supra], and Pritam versus Ratilal & Another (1972) E.A 560.

i. In defining a landlord/tenant relationship, the court has to look at the definitions provided in Act, which defines landlord in section 2 as follows:

> " A landlord in relation to a tenancy, means the person for the time being entitled, as between himself and the tenant, to the rents and profits of the premises payable under the terms of the tenancy;"

The section proceeds to define a tenant as follows:

> " tenant" in relation to a tenancy means the person for the time being entitled to the tenancy whether or not he is in occupation of the holding, and includes a sub-tenant;"

In this case, there was no express tenancy agreement produced between the 1st respondent and the appellant. Indeed, there was no privity of contract between them as was held in Price versus. Eaton (1833) 4b & Ad 433.

j. In the case of Kenya Women Finance Trust versus Bernard Oyugi Jaoko & 2 others [2018] KEHC 4933 (KLR), the court cited with approval the Court of Appeal holding in Savings & Loan (K) Limited versus. Kanyenje Karangaita Gakombe & Another (2015) eKLR and held as follows:

> " In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principles thus:
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> > "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them Agricultural Finance Corporation Versus Lendetia Ltd (supra), Kenya National Capitalcorporation Ltd versus ALbert Mario Cordeiro & Another (supra) and William Muthee Muthami V Bank Of Baroda, (supra). Thus, in Agricultural Finance Corporation Versus Lendetia LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

> "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

Over time, some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them, and a third party relating to the same subject matter. Thus, in the case of Shanklin Pier versus Detel Products Ltd (1951) 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff, notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

k. While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted, and has in fact been the subject of much criticism. In the case of Darlington Bourough Council versus Witshire Northen Ltd [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:

> " The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties.. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

Some jurisdictions have accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 respectively, have been enacted.

l. The document headed "Money Receipt Agreement" at page 94 of the record of appeal, shows that the 2nd respondent received Kshs.850,000/= for "payment of a ground floor located at Joe Kadenge Road opposite Fire Station in Mombasa" to the appellant. It is not quite clear what to make of this document. It cannot be discerned or determined to be a sale agreement, tenancy agreement or any legal agreement for disposition of the suit premises, as the 2nd respondent could not purport to sell what was not owned by her without the 1st respondent's express authority. Assuming that the said Kshs.850,000/= was goodwill as argued by the appellant, that could only have been used when referring to a business reputation as was held in the case of Commissioner of Inland Revenue versus Muller & Co. Margarine Ltd [1901] AC 217; [1900-1903] All ER 413, where Lord Macnaghten held;

> " What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established business from a business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates."

The 2nd respondent could only sell her business or items in her business to the appellant, but was expressly forbidden by the agreement at page 70 of the record of appeal paragraph *2*(f) from subletting or transferring possession of the suit property.

m. This court agrees with the appellant's counsel submissions that the 1st respondent ought to have served a termination notice to the appellant as provided in section 5 (2) of the said Act, but the fact remains that there was still no privity of contract between the appellant and the 1st respondent. The court also notes that any orders made by the tribunal before rendering itself

on whether or not it had jurisdiction were null and void, and thus the 1st respondent cannot be held to be in contempt of those orders as was held in Owners of Motor vessel Lillian S versus Caltex Kenya Limited (1989) KLR 1. The court therefore holds that the tribunal did not have jurisdiction, to deal with the dispute raised by the appellant for the reasons set out above. Had the tribunal made the decision that it was without jurisdiction at the start, it would not have struck out the matter through the ruling delivered by the Chairman on 5th March 2020, and no other orders would have been made, as it would have downed its tools.

n. In view of the foregoing finding, it would be an academic exercise for the court to proceed in analysing the tribunal's jurisdiction with respect to recovery of possession. It is instructive to note that in the ruling dated 5th March 2020 for the notice of preliminary objection dated 30th January 2020, the tenant was in possession of the suit property, but in the final judgment delivered on 13th October 2023, that had changed, and for that reason among others set out above, the tribunal was without jurisdiction.

o. The 1st respondent had duty of care under section 5 (2) of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Cap 301 to issue notice of termination, and hence should not have disposed of the appellants goods through her advocate as she admitted in the document at page 190 of the record of appeal. However, as this court is sitting in its appellate jurisdiction, and having found the tribunal was without jurisdiction, it will not deal with aspects of the dispute like compensation that should first be raised before a trial court. I will leave that to the appellant to take legal advice on how to move the appropriate trial court. The appeal is nevertheless without merit for the foregoing reasons.

p. Section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the event unless where for good reason otherwise ordered. In this case, there is no good reason to depart from the rule and the appellant shall bear the costs of the appeal while the respondents shall bear the costs of the notice of preliminary objection.

7. From the foregoing determinations, the court finds and orders as follows:

a. That the 1st respondent's notice of preliminary objection is without merit and is rejected with costs to be borne by the 1st respondent.

b. That the appellant has failed to establish the appeal on a balance of probabilities and it is hereby dismissed, with costs to be borne by the appellant.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 26TH DAY OF FEBRUARY 2025.

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence of:

Appellant : Mr Odongo

Respondents : M/s Natasha Ali

Shitemi – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.