



REPUBLIC OF KENYA



**KENYA LAW**  
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**Be Energy Limited v Godfrey Mugambi Kimathi t/a Kyms Liquor Store (Environment and Land Appeal 3 of 2024) [2024] KEELC 3823 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3823 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL 3 OF 2024**

**MD MWANGI, J**

**MAY 9, 2024**

**BETWEEN**

**BE ENERGY LIMITED ..... APPELLANT**

**AND**

**GODFREY MUGAMBI KIMATHI T/A KYMS LIQUOR STORE . RESPONDENT**

*(In respect to the Preliminary Objection dated 10<sup>th</sup> March, 2024  
challenging the appeal for being filed without leave of the Court)*

**RULING**

**Background**

1. This ruling is in respect to the Preliminary Objection filed by the Respondent dated 10<sup>th</sup> March, 2024. The Preliminary Objection is premised on 3 grounds, namely that:
  - a. This Court lacks jurisdiction to entertain, hear or determine the Memorandum of Appeal dated 2<sup>nd</sup> November, 2023 as brought against the Respondent since the Appellant herein did not seek or obtain leave to appeal from the subordinate court (Tribunal). The order and ruling appealed from does not fall under the thematic orders which appeals lie as of right as set forth under Order 43 Rule (1) of the *Civil Procedure Rules* and Section 75 of the *Civil Procedure Act*. The ruling and order being the subject of this appeal arose from the provisions of order 51 rule 1 of the *Civil Procedure Rules*, Section 3 & 3A of the *Civil Procedure Act* and Article 50(1) and 159 of the *Constitution* of Kenya, 2010.
  - b. In the premises, the Court therefore lacks the jurisdiction to entertain this appeal of the said ruling and order of the Tribunal does not lie as of right but only lies with leave of the court, making such order which is a procedure precedent before this Court exercises its Appellate Jurisdiction.



- c. In whole, the appeal herein is inherently bad in law, vexatious and frivolous and the proceeding herein is an abuse of the Court process.
2. Interestingly, the Preliminary Objection was filed after the recording of a consent by the parties allowing the Appellant's Notice of Motion dated 18<sup>th</sup> January, 2024. The consent order allowed a stay of execution of the judgement of the trial court pending hearing and determination of this appeal. It further directed the Appellant to deposit the decretal amount of ksh 4,032,095/- in a joint interest earning account in the names of the Advocates for the Appellant and the Advocates for the Respondent within 21 days from the date of the consent. In default, the Respondent be at liberty to execute.
3. Upon the adoption of the consent, the matter was set down for directions. It was on the date set for directions when the Respondent informed the court that it had filed the notice of Preliminary Objection.

#### **Directions by the Court:**

4. The Court's directions were that the Preliminary Objection was to be considered first since directions on the hearing of the appeal had not yet been issued. The Court further directed that the Preliminary Objection be canvassed by way of written submissions. Both parties complied and filed their respective submissions. The Court has had occasion to read and consider the submissions.

#### **Issues for determination:**

5. The sole issue for determination is whether the Preliminary Objection by the Respondent is merited. Off course, the court will determine the issue of costs dependent on the outcome of the first issue.

#### **Analysis and Determination:**

6. Under order 42 rule 13(2) of the *Civil Procedure Rules*, any objection to the jurisdiction of the appellate court shall be raised before the Judge before he gives directions under this rule. This rule informed the Court's decision to allow the prosecution of the Preliminary Objection by the Respondent at this stage since directions on the hearing of the main appeal have not been issued.
7. In his submissions, the Respondent distinguished between a 'reference' and a 'complaint' as defined in the *Landlord and Tenants Shops, Hotels & Catering Establishments Act*, Cap 301 Laws of Kenya (hereinafter referred to as the Act). In this case, the decision appealed from was from a complaint before the Business Premises Rent Tribunal (BPRT) registered under Cause Number E6689/2023. The Complaint is at Page 5 of the Record of Appeal.
8. The complaint was expressed to have been brought under the provisions of Section 12(4) of the Act. The Complaint was against a one-month Notice issued by the Landlord to the Tenant terminating the tenancy hence subjecting the tenant to untold suffering in terms of loss of business.
9. The Respondent submitted that under section 15 of the Act, the right to appeal to this Court as of right is only provided for references only. The Respondent cited the decision of Oguttu Mboya J in the case of *Mike Muli v Justus Mwandikula Kilonzo & 4 others* [ 2022] eKLR, where the Judge stated that the only persons who have a right of appeal to this court are parties to a Reference who have been aggrieved by a determination or order arising from the Reference and not otherwise.
10. The Respondent's position is that if a party to a complaint was keen on lodging an appeal against a determination or order arising therefrom, then he/she must seek leave to appeal before the Tribunal at the 1<sup>st</sup> instance or before the Environment and Land Court where leave is declined at the Tribunal.



In this case, the Appellant lodged its appeal to this Court without leave from either the Tribunal or this court. It is on that basis that the Respondent raises an objection on this Court's jurisdiction to entertain the said appeal.

11. The Appellant in its submissions while admitting that the BPRT had made a ruling on 5<sup>th</sup> October, 2023 in cause no 6689 of 2023, asserts that the said ruling was adopted as a judgment of the Court in Milimani Misc. Cause no E1640 of 2023 on 14<sup>th</sup> November, 2023, and became the subject of execution. It avers that the Respondent commenced execution proceedings under the provisions of Order 22 rule 6 of the Civil Procedure Rules leading to the Consent by the parties filed on 22<sup>nd</sup> January, 2024 that stayed execution pending the determination of the appeal under the provisions of Order 22 rule 25.
12. It is the Appellant's submissions that Order 43 rule 1(k) of the Civil Procedure Rules allows an appeal as of right. The Appellant therefore submits that this Court has the jurisdiction to hear and determine this Appeal. The Appellant expresses surprise that the Respondent wishes to challenge the jurisdiction of the Court having duly entered into the consent filed on 22<sup>nd</sup> January, 2024.
13. The Appellant made reference to the case of R v Keumbu Land Disputes Tribunal & 2 others & another ex parte Agnes Bichanga [2014] eKLR, where the Court expressed an opinion that where the Applicant had agreed to have the dispute with the Interested Party referred to the 1<sup>st</sup> Respondent for determination, it was not open to her to turn around and challenge the jurisdiction of the 1<sup>st</sup> Respondent. The Court acknowledged that parties cannot confer jurisdiction upon a Court or a Tribunal by consent. However, it also stated that the Applicant (in that case) was bound by the consent order that was made in the high Court referring the dispute to the 1<sup>st</sup> Respondent. The Court opined that if for any reason the Applicant felt afterwards that the 1<sup>st</sup> Respondent did not have the requisite jurisdiction to determine the dispute, she should have moved the High Court to set aside or vary the consent orders.
14. The Appellant's appeal in this case was filed by way of a Memorandum of Appeal dated 2<sup>nd</sup> November, 2023. The appeal raises a total of 17 grounds against the judgment of Hon. Patricia May, delivered on 5<sup>th</sup> October, 2023 in Nairobi Business Premises and Rent Tribunal Case no E6689 of 2023. The Memorandum of Appeal is crystal clear that the appeal is against the decision of Hon. Patricia May in BPRT Cause no E6689 of 2023. It is evidently not an appeal against the execution proceedings as the appellant insinuates in his submissions; certainly not an appeal under Order 22 rule 25 of the Civil Procedure Rules. The assertion by the Appellant is therefore baseless.
15. The Appellant in his submissions intimates that the Respondent by agreeing to sign the consent adopted by this Court on 23<sup>rd</sup> January, 2024 conceded to the jurisdiction of this Court to hear and determine this matter. Further that by the act of signing the consent, the Respondent is barred from raising an objection to the jurisdiction of the court as he has done.
16. The consent by the parties herein was in respect of an interlocutory application; the Notice of Motion Application filed by the Appellant seeking to stay execution against it initiated by the Respondent pursuant to the decree of the BPRT pending the hearing and determination of the appeal. The parties agreed to stay the execution on the condition that the Appellant deposits the decretal amount of ksh 4,032,095/= in a joint interest earning account in the names of the Advocates for the parties pending hearing and determination of the appeal.
17. From my reading of the consent by the parties, there was no agreement reached on the mode of hearing and determination of the appeal. An appeal like an ordinary civil suit may be determined summarily, it may as well be struck out on an objection or where no objection is raised by way of a meritorious



hearing. The consent by the parties did not bar the determination of this appeal summarily or by way of an objection. The reasoning in *R v Keumbu Land Disputes Tribunal & 2 others & another exparte Agnes Bichanga* [2014] eKLR cannot apply in this case.

18. The consent by the parties too did not and could not in any way purport to confer jurisdiction on this Court, where none exists. The Jurisdiction of any court in this country is conferred by either the Constitution or Statute or both. Jurisdiction is a fundamental issue and as the Court in the case of *Equity Bank ltd v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR aptly stated:

“It is settled that parties cannot, even by their consent confer jurisdiction on a Court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the O2 (oxygen) Principle or the Overriding objective under the *Civil Procedure Act*, the Appellate Jurisdiction Act or even Articles 159 of the *Constitution* to remedy the same”.

19. The Respondent is therefore within his rights to raise the Preliminary Objection to the jurisdiction of this Court as he has done.
20. The substance of the Preliminary Objection by the Respondent is that the appeal by the Appellant is incompetent having been filed without leave of either the Tribunal or this court and that this Court therefore lacks the jurisdiction to entertain and determine it.
21. Justice Oguttu Mboya in the *Mike Muli* case (*supra*) found that the right of appeal under section 15 of the Act, is only available to parties to a Reference who are aggrieved by a determination or order arising therefrom. He cited with approval the decision in the case of *Re-Heptulla Properties Ltd* [1979] eKLR where the Court had made a similar finding.
22. In the case of *Gilas Yimbo t/a Woodvale Associates v Eldomart Holdings Ltd* [2008] eKLR, Visram J (as he then was) stated that:

“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 to 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.”

23. I fully agree with the reasoning of my brother Judge Oguttu on the interpretation of Section 15 of the Act. Consequently, I uphold the Preliminary Objection by the Respondent in this matter. The appeal is incompetent having been filed without leave of the Tribunal as if it were an appeal from a Reference. This Court therefore lacks the jurisdiction to entertain and determine the appeal.
24. I have said enough. The conclusion is that the Respondent’s Preliminary Objection is upheld with costs to the Respondent. Consequently, the appeal herein is struck out with costs to the Respondent.
- It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2024.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

Ms. Langat holding brief for Mr. Banda for the Appellant



Ms. Oketch for the Respondent

Yvette: Court Assistant.

**M.D. MWANGI**

**JUDGE**

