



Fly 540 Aviation Limited v Entebbe Handling Services Limited (Civil Appeal E218 of 2022) [2024] KEHC 9592 (KLR) (Civ) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9592 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E218 OF 2022

HI ONG'UDI, J

JULY 26, 2024

BETWEEN

FLY 540 AVIATION LIMITED APPELLANT

AND

ENTEBBE HANDLING SERVICES LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of Hon. Gathogo Sogomo Principal Magistrate in Nairobi Chief Magistrate's MCCC No. 3111 of 2016, delivered on 18th March 2022)

JUDGMENT

1. This appeal arises from the ruling and order entered in Nairobi Commercial Court Chief Magistrate Court Case No. E3111 of 2016. In the said suit, the respondent (who was the plaintiff) vide the plaint dated 19th May, 2016 sued the appellant for the sum of US\$ 85,183.50/= plus interest at court rates from 1st October, 2012 being the balance of payment for airport handling services rendered to the respondent.
2. The appellant in response to the plaint filed a statement of defence under protest and the same is dated 7th July, 2016 under protest. In the said defence under paragraph 2 it raised a preliminary objection challenging the court's jurisdiction to determine the suit.
3. The trial court in its ruling dated 18th March 2022 dismissed the said preliminary objection with costs.
4. Being aggrieved with that Ruling the appellant lodged the appeal dated 7th April, 2022 on the following grounds:
 - i. That the learned magistrate erred in law and in fact by not applying the correct and proper law in respect of conflict in jurisdiction and therefore reached a wrong conclusion.



- ii. That the learned magistrate erred in law. and in fact by applying municipal law instead of laws relating to conflict of laws.
 - iii. That the learned magistrate erred by applying and relying on the wrong law and therefore reached the wrong conclusion.
 - iv. That the learned magistrate erred in law and in fact by ignoring the legal precedents presented by the appellant.
 - v. That the learned magistrate erred in law and in fact by failing to consider or properly consider or at all the submissions by the appellant.
 - vi. That the learned magistrate erred by dismissing the Preliminary Objection.
 - vii. That the learned magistrate erred by holding that he had the jurisdiction to try the matter before him.
5. The Appeal was canvassed through written submissions.

Appellants' submissions

6. The appellants' submissions were filed by Mungu, Kimetto & Company advocates and are dated 20th March 2023. Counsel identified one issue for determination that is whether the Magistrate erred in law and in fact by holding that the lower court had jurisdiction to hear and determine the suit.
7. He submitted that the parties herein entered into an agreement dated 8th March, 2008 in which they agreed that payment would be done in Ugandan shillings and the same was deposited in Barclays Bank Uganda and Crane Bank Uganda. More so, that the services were wholly rendered at Entebbe airport in the Republic of Uganda. However, the said contract did not expressly state the law that governed the contract.
8. Counsel submitted further that where the intention of the parties to a contract in regard to the law governing the contract was not expressed in words their intention was to be referred from the terms and nature of the contract or the general circumstances of the case. Further, that certain presumptions would arise to the proper law of contract in the absence of countervailing considerations. He added that the first presumption in this case would be the one of laws of the county where the contract was actually made and where the same was to be wholly performed.
9. In support of this position counsel placed reliance on the case of Karachi Gas Co. Limited v Issaq [1965] EA 42 at Page 53 where it was held as follows;
- “The close test that is to be applied is that with which the transaction has its closest and most real connection”. It was further held in the case of Roberta Macclendon Fonville -Vs James Otis Kell If & Others 2002 Eklr it was held that the test to be applied is in my view, the system of law by reference to which the contract was made or that which the transaction has its closest and most real connection”
10. Counsel subsequently submitted that the closest and most real connection would be where the contract was entered into and performed. Further, that the contract was entered into in Uganda, the same was performed in the Republic of Uganda and payments for the alleged services were allegedly made in Uganda. Moreover, that the respondent's company was incorporated and operated in Uganda. In addition, that the same was licensed by the airports authority to provide services that it could not



do in Kenya since it was not licensed by Kenya Airports Authority. He placed reliance on the case of United India Insurance Company Limited v East Africa Underwriters (Kenya) Ltd 1985 KLR 898.

11. In conclusion, counsel submitted that the trial Magistrate misdirected himself by dismissing the preliminary objection and holding that the Court had jurisdiction. He urged the Court to allow the Appeal with costs and the order of dismissal of the Preliminary Objection in the lower court be set aside.

Respondent's Submissions

12. The respondent's submissions were filed by Mogaka, Omwenga & Mabeya advocates and are dated 20th October 2023. Counsel submitted the appellant raised its preliminary objection vide paragraph 2 of their statement of defence dated 7th July, 2016 found in page 35 to 36 of the record of appeal. Further, that the defence challenged many other issues which ought to be determined through full trial because they fall outside the ambit of a preliminary objection. He placed reliance on the case of Independent Electoral & Boundaries Commission -v Jane Cheperenger & 2 Others [2015] eKLR where the Supreme Court explained as follows regarding preliminary objections:

“(21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially and on the merits.” Emphasis mine

13. Counsel finally submitted that this court had jurisdiction to entertain this suit based on the enforceability of the contract which issue was to be established by evidence from both parties. Further, that the preliminary objection raised no pure point of law on its own. He urged the court to dismiss this appeal with costs to the respondent.

Analysis and Determination

14. This being a first appeal, this court is called upon to re-evaluate and re-consider the evidence on record and arrive at its own conclusion. See
 - i. Selle & another V Associated Motors Boat & Others 1968 E.A 123.
 - ii. Peters V Sunday Post Limited [1958] E.A 424.
15. I have carefully perused and considered the grounds of appeal, evidence on record, cited authorities and the law, and identified one issue for determination which is whether there was any merit in the preliminary objection raised vide paragraph 2 of the statement of defence dated 7th July, 2016.
16. The appellant argued that the contract was entered into in Uganda, performed in the same county and payments for the alleged services were allegedly made in Uganda. Moreover, that the respondent's company was incorporated and operated in Uganda. He added that the trial Magistrate misdirected himself by holding that the Court had jurisdiction.



17. The respondent on its part argued that this court had jurisdiction to entertain this suit based on the enforceability of the contract which issue was to be established by evidence from both parties. Further, that the preliminary objection raised no pure point of law on its own.
18. The trial Magistrate in his ruling faulted the appellant for referring to contracts as between the parties. According to him, the production of the said materials ought to have been reserved for a trial platform for admissibility and interrogation via cross-examination. He added that it was premature and untenable for the applicant to attempt to produce the said materials.
19. While relying on the cases of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA, 696 and *Independent Electoral and Boundaries Commission v Jane Cheperenger & Others* [2015] eKLR, the trial magistrate proceeded to dismiss the appellant's preliminary objection.
20. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter.
21. The legal preposition on preliminary objection has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd* (supra). Where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer it raises a pure point of law which is argued 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”
22. A Tanzanian Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & others vs Attorney General* (Civil Revision No 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, JA, Ramadhani, CJ, Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.”
23. In view of the above cited authorities, it is evident that a preliminary objection is on clear pure points of law. Further, where a point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection.



24. In the instant case there is a contest as to the facts of how, where the contract between the parties herein was entered into and also, on the law governing the contract. To be able to determine this, the court would be required to place evidence before the court in support of and against the said objection.
25. The law is that a preliminary objection raises a pure point of law and which is argued on the assumption that all the facts pleaded by the other side are correct. It does not require the educement of evidence. Once that happens and that evidence is challenged by the other party the issue raised ceases to be a preliminary objection. That is exactly what happened in this case in the lower court. I therefore find no reason to make this court interfere with the orders dismissing the preliminary objection.
26. The upshot is that the Appeal lacks merit and is hereby dismissed with costs. The lower court file to be taken back t the trial court for hearing and determination.
27. Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 26TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

