



REPUBLIC OF KENYA



**Wilson M. Kariuki t/a Wiskam Auctioneers & another v Hassco (K) Limited & 2 others
(Civil Appeal E335 of 2022) [2024] KEHC 8995 (KLR) (Civ) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8995 (KLR)

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

CIVIL

CIVIL APPEAL E335 OF 2022

WM MUSYOKA, J

JULY 26, 2024

BETWEEN

**WILSON M. KARIUKI T/A WISKAM AUCTIONEERS 1ST APPELLANT
EASTLEIGH DEVELOPMENT LIMITED 2ND APPELLANT**

AND

**HASSCO (K) LIMITED 1ST RESPONDENT
AHMED SAMAN OLOW HASSAN 2ND RESPONDENT
ABDI MOHAMUD ABEY 3RD RESPONDENT**

(An appeal arising from the orders in the ruling of Hon. AN Makau, Principal Magistrate, PM, delivered on 6th May 2022, in Milimani CMCCC No.E1225 of 2022)

JUDGMENT

1. The suit, at the primary court, was initiated by the 1st respondent, against the appellants, for a variety of orders relating to a distress for rent, allegedly carried out by the 1st appellant, on instructions of the 2nd appellant. The 1st respondent denied any tenancy relationship between it and the 2nd appellant, and argued that that made the distress for rent illegal. The 1st respondent argued that it, and its tenants, suffered loss during the alleged illegal distress for rent. The appellants did not file a defence to the claim, for the appeal herein arises from interlocutory orders made in a ruling rendered before the appellants had even been served with summons to enter appearance.
2. The ruling, whose orders gave rise to this appeal, was, allegedly, in respect of 2 applications, one dated 8th March 2020, and the other 11th March 2022. They sought orders to restrain the sale of motor vehicles and timber, distrained by the 1st appellant, which allegedly belonged to third parties, who



were customers at the garage in the premises, owned by the 1st respondent. In the applications, the 1st respondent asserted that the 2nd appellant was not its landlord, instead the person that it related with as its landlord was the 2nd respondent, who was named as the 1st interested party, in the suit before the trial court. In the end, the orders sought were granted, on the basis that it had not been established that there existed any tenancy relationship between the 1st respondent and the 2nd appellant, to found basis for a distress for rent on the property of the 1st respondent, within premises that it occupied within the disputed property, being LR No. 36/IV/109 Eastleigh Section II.

3. The appellants were aggrieved by those orders, hence the instant appeal. One of the grounds in the appeal, as set out in the memorandum of appeal, dated 18th May 2022, is that the trial court arrogated itself jurisdiction, contrary to Article 162(2) of the Constitution and section 13 of the Environment and Land Court Act, Cap 8D, Laws of Kenya.
4. Directions were given on the disposal of the appeal, on 7th August 2023, and the parties complied, by placing their respective written submissions on the record.
5. Jurisdiction is everything, and, going by Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR (Nyarangi, Masime & Kwach, JJA), where there is no jurisdiction, the court should down its tools. Before I can exercise my mind on the issues raised in this appeal, I will have to consider whether I have jurisdiction, in the first place, to determine the appeal on its merits.
6. At the heart of the dispute before the trial court is a tenancy. The dispute erupted when the appellants purported to distrain for rent, ostensibly on the basis that there was a tenancy relationship between the 1st respondent and the 1st appellant. The 1st respondent denies that alleged tenancy with the 1st appellant, and asserts that its landlord is the 2nd respondent, and, therefore, the purported distress for rent was without foundation, and was illegal. The trial court appeared to agree with that, hence the orders made on 6th May 2022.
7. Tenancy defines the relationship between the owner of landed property and the person occupying the said property. The tenancy is created when the owner of the landed property enters into an agreement with the tenant, to let the tenant occupy the landed property, at a consideration, taking the form of rent. That agreement grants the tenant the right to occupy the property of another. At the core of this arrangement would be title to the property, and occupation and use of the property. A person can only let a property to another when he has title to that property. The letting allows the other to occupy the property, for use in one way or the other.
8. In the dispute between the parties hereto, the issues around title to property, its occupation and use are at the fore. The 2nd appellant purported to distrain for rent, on the basis that it had title to the property in question, which was being occupied and used by the 1st respondent. The 1st respondent denies the claim to title of the property by the 2nd appellant, and asserts that the title belonged to the 2nd respondent. According to the 1st respondent, as the 2nd appellant had no title to that property, it was not entitled to claim rent for it.
9. As the dispute before the trial court turns on issues around title to, and occupation and use of landed property, the High Court would have no jurisdiction over it, whether as a primary or appellate court. That jurisdiction was taken away by the Constitution of Kenya, through Article 162(2), which provides for establishment of another court, with the status of the High Court, to deal with disputes that turn on title to, and occupation and use of, landed property. Article 165(5) of the Constitution is emphatic that the High Court has not jurisdiction over a dispute on the matters the subject of Article 162(2), that is those that touch on title to landed property, and the occupation and use of such property.



10. Parliament, in obedience to Article 162(3) of the *Constitution*, did pass a law, to establish the court envisaged in Article 162(2). That legislation is the *Environment and Land Court Act*, which establishes the Environment and Land Court. Section 13 of the *Environment and Land Court Act* delineates the jurisdiction of the Environment and Land Court. Section 13(2) of that Act states that the Environment and Land Court exercises its jurisdiction under Article 162(2) of the *Constitution*, and has power to hear and determine disputes relating to land, including disputes relating to rents, private land and contracts, and instruments granting any enforceable interests in land, and any other dispute relating to land. The Environment and Land Court has both original and appellate jurisdiction.
11. In view of the provisions discussed above, the High Court is bereft of jurisdiction to wade into the dispute between the parties hereto over the ownership or title to the suit land and premises, and the tenancy between the 1st respondent and whoever would be the proprietor of such land and premises. Going by *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR (Nyarangi, Masime & Kwach, JJA), I should down my tools, with respect to this appeal, which I hereby do.
12. So, what becomes of the appeal? Should I dismiss or strike it out? Should I let it lie in limbo, and allow the appellants decide on its fate, in terms of whether to withdraw it, or to apply to have it transferred to the court with jurisdiction? Or should I order its transfer to the court with jurisdiction?
13. Judicial opinion is divided on what the High Court, when or where it finds itself confronted with a matter in respect of which it has no substantive jurisdiction to determine, should do with such a matter. The Court of Appeal has made a variety of conflicting decisions on this. In some, it has ruled that the High Court would have administrative power to order transfer of the matter to the court with jurisdiction. In others, it has ruled that, since to order transfer of a cause from the High Court is a judicial function, which can only be exercised judicially, with respect to matters where jurisdiction is either on pecuniary or territorial basis, there would be no jurisdiction to order the transfer. So that where a matter is filed before a court without substantive, rather than pecuniary or territorial, jurisdiction, the cause or matter would be incompetent, and the court without jurisdiction cannot order transfer of that suit, because the cause or suit is incompetent, and because the court would have no jurisdiction to order the transfer.
14. I have found persuasion in such decisions as *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA) and *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA), where the courts have said that in such situations the cause ought to be struck out, and I hereby strike out the appeal herein. I shall make no order on costs, for want of jurisdiction. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 26TH DAY OF JULY 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Odhiambo, Legal Researcher.

Advocates

Mr. Maingi, instructed by SM Muhia & Company, Advocates for the appellant.

Mr. Alosa, instructed by Oscar Otieno & Company, Advocates for the respondent.

