



Cop-Rink Agencies Limited & another v Kayser Investment Limited (Civil Appeal E081 of 2021) [2024] KEHC 10536 (KLR) (Commercial and Tax) (27 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10536 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E081 OF 2021
A MABEYA, J
AUGUST 27, 2024**

BETWEEN

COP-RINK AGENCIES LIMITED 1ST APPELLANT

JING ZHANG AKA JIN WEIBING 2ND APPELLANT

AND

KAYSER INVESTMENT LIMITED RESPONDENT

RULING

1. Before Court for determination is the preliminary objection raised by the respondent on 19/5/2023. The objection was founded on the grounds that the Court did not have jurisdiction over the appeal since it arises from a suit of vacant possession. That the record of appeal is incurably defective for non-compliance with the mandatory provisions of Order 42 rule 13.
2. Parties filed their respective submissions which I have carefully considered. The appellant argued that the suit had initially been filed as a commercial suit in the Subordinate Court, with one of the prayers seeking interest at compounded commercial rates. Based on this, the appellant chose to pursue an appeal before this Court.
3. The appellant's Counsel contended that, in line with Article 159(2) of *the Constitution*, which emphasizes that justice should be administered without undue regard to technicalities, it would be more just to transfer the suit to the appropriate court rather than striking it out if it was determined that it had been improperly filed in the current court. Furthermore, the appellant submitted that the record of appeal was not defective, as a supplementary record containing certified copies of the missing documents can be lodged with leave.



4. The respondent argued that the plaintiff in the trial court had framed the suit as one for the recovery of rent and vacant possession, with the central issue being whether the respondent had breached a tenancy agreement. The respondent's counsel contended that, given the landlord-tenant relationship between the parties, the High Court lacked jurisdiction over the matter and should therefore be struck out. Counsel emphasized that the Environment and Land Court has exclusive jurisdiction over such disputes.
5. Additionally, the respondent submitted that the appellant's record of appeal was incomplete, pointing out that it lacked essential documents, including the proceedings and decree from the trial court. Counsel also noted that two years had passed since the appeal was scheduled for hearing, implying that the delay was further reason to question the validity and completeness of the appeal.
6. I have carefully considered the preliminary objection and the submissions made thereon. The central issue for determination is whether the preliminary objection dated 19/5/2023, is well-founded and meritorious. A preliminary objection was defined in *Mukhisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696, as one consisting pure points of law which when raised as a preliminary point is capable of disposing off the suit. It is argued on the assumption that all facts are correct as pleaded.
7. In the present case, it was contended that the Court lacks jurisdiction to hear and determine the appellants appeal. The respondent argued that the Court was not the appropriate forum for resolving the dispute, as the same arose from a landlord-tenant relationship and concerned vacant possession of real property. According to the respondent, such matters fall within the exclusive jurisdiction of the Environment and Land Court.
8. It well established that the issue of jurisdiction must be addressed and resolved at the earliest opportunity. If a court lacks jurisdiction, any decision or orders it makes are null and void. Therefore, it is crucial that the question of jurisdiction is settled before the Court proceeds to consider the substantive issues of the case. See the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1.
9. Article 162(2)(b) of *the Constitution* of Kenya 2010 mandates Parliament to establish courts with the status of the High Court to handle specific types of disputes. It provides: -

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— (b) the environment and the use and occupation of, and title to, land.”
10. Section 13 of the Environment & Land Court *Act No. 19 of 2011* sets out the jurisdiction of that Court. It provides in part as follows: -

“The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provision of this Act or any other law applicable in Kenya relating to environment and land.

 - (2) In exercise of its jurisdiction under Article 162 (2), (b) of *the Constitution*, the court shall have power to hear and determine disputes...
 - (a) Relating to environmental planning, and protection, climate issues, conduct planning, title, tenure, boundaries rate, rents, valuation, mining, mineral, and other natural resources;
 - (b) Relating to compulsory acquiring of land;



- (c) Relating to land administration and management;
- (d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.
- (e) Any other dispute relating to the environment and land.”

11. In *Suzanne Butler & 4 Others v Redhill Investments & Another* (2017) eKLR, the court held that: -

“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

12. I have reviewed the record. In the plaint dated 12/2/2020, the lower court was approached for the following orders: -

- “ a) A declaration that the lease agreement dated 19th September,2017 is repudiated by the Defendant’s breach.
- b) Vacant possession
- c) Rent arrears in the sum of Kshs.1,008,375/-, as at end of January 2020.
- d) ...”

13. Clearly, the foregoing shows that the cause of action was the use or occupation of land. Although there were claims about breach of contract, those were periphery. The dominant purpose issue was that of termination of the relationship between a landlord and tenant. There was the issue of recovery of possession of the premises and therefore occupation thereof.

14. Accordingly, I find that this Court has no jurisdiction to entertain the appeal. The preliminary objection is hereby upheld and the appeal is struck out with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE

