



REPUBLIC OF KENYA



KENYA LAW
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**Nkugwe Investments Limited v Mayabi & another (Commercial Appeal E138 of 2022)
[2023] KEHC 18449 (KLR) (Commercial and Tax) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18449 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E138 OF 2022**

PN GICHOHI, J

MAY 31, 2023

BETWEEN

NKUGWE INVESTMENTS LIMITED APPELLANT

AND

DEREX XAVIER MAYABI 1ST RESPONDENT

VILLA CARE LIMITED 2ND RESPONDENT

*(Being an appeal from the Ruling of Hon. J.W. Munene delivered on 8th
September 2022 in Milimani Small Claims Court Case No. E 4305 of 2022
and the Court Order arising therefrom and dated 20th September, 2022)*

JUDGMENT

1. The background of this appeal is that around June 192017, the Appellant and the 1st Respondent entered into a sale agreement for the sale of three bedroomed apartments situated at Ruby Flats on LR No Block 209/10722 /88 Block A Unit A5 Villa Care Limited through the 2nd Respondent who were the Agents of the Appellant.
2. The purchase price was Ksh 7,800,000/=with 10% payable deposit. The 2nd Respondent duly paid Ksh 780,000/= while making an arrangement with Kenya Commercial Bank as to how he would pay the balance. It was after the bank did due diligence to secure its interest that it established that the property in which the apartments had been erected had been adversely been mentioned in the Ndungú Report as a grabbed public land and therefore not available for sale. As a consequence, the bank declined to finance the acquisition .
3. The 1st Respondent's advocates at the time then wrote to the Appellant and 2nd Respondent indicating that his financier was reluctant to proceed further with the purchase. The 1st Respondent therefore



requested for a refund of the deposit paid to their account but they declined to offer any positive response to the demand for the refund. This finally led the filing of Civil Suit No 263 of 2019 in the Chief Magistrates' Court in Nairobi as against the Appellant and the 2nd Respondent. However, the 1st Respondent later withdrew the said suit and filed the SCCCOMM Case No 4305 of 2022 in the Small Claims Court Nairobi seeking the following reliefs:

1. Judgment in the sum of Ksh 780,000/= (Being principle sum and accrued interest)
 2. Compensation (to be determined by the court)
 3. Costs of the Claim (to be assessed by the court)
 4. Other appropriate relief being interest on the accrued amounts from the date the same fell due till payment in full.
4. Upon being served, the 2nd Respondent filed its response denying the claim arguing that it was the Appellant's agent whose work was limited to advertising on behalf of the Appellant herein and the 2nd Respondent was never given the 10% deposit of the purchase price. The 2nd Respondent therefore urged that the 1st Respondents Claim be dismissed with costs to the 2nd Respondent.
5. On their part, the Appellant filed a Notice of Preliminary Objection dated August 13, 2022 seeking that the suit be dismissed with costs on the grounds that;
1. The court lacked jurisdiction to hear and determine the suit since the subject matter directly and substantially concerned a dispute over property.
 2. Section 13 of the *Small Claims Court Act* No 2 of 2016 specifically precludes the court from hearing matters whose cause of action is founded upon dispute over title to, possession or use of land.
6. The Appellant also filed an Application dated August 15, 2022 claiming the Small Claims Court Case No E4305 of 2022 is *sub judice* and *res judicata*. The parties were directed to file and did file submissions as a way of disposing off both the Preliminary Objection and the Application. The court rendered its decision vide Ruling dated September 9, 2022 and dismissed both the preliminary objection and the application with costs to the Claimant. To be specific, the court held;
- “The court finds that the preliminary objection is devoid of merit. The claim as instituted is of contract. The Claimant prays for a refund of consideration paid under the contract. He is not praying for specific performance and this alone brings it squarely under the purview of Section 12 (1) (a) (b) as read together with section 12 (3) of the Small Claims Court. This court also finds that the application dated August 15, 2022 is devoid of merit.
- The Defendant has duly pleaded that the case filed in Milimani CMCC No 263 /2019 has been withdrawn . The instant case is therefore not *res judicata* or *sub judice*...these claims by the claimant have not been rebutted even though the Notice of Withdrawal in Milimani CMCC No 263 /2019 has not been annexed in the claimant's relying affidavit...both the Preliminary Objection and the application by the 1st Respondent are dismissed with costs to the Claimant .”
7. Aggrieved by the ruling, the Appellant filed an application dated October 4, 2022 before the Small Claims court seeking stay of the proceedings in the small claims court pending hearing and determination of this appeal . That application was found without merit and dismissed with costs to the Claimant vide ruling delivered on November 3, 2022.



8. The Appellant was aggrieved by that decision and in the Memorandum of Appeal dated May 7, 2022, the Appellant lists four grounds of appeal as follows;
 1. The learned Adjudicator erred in law in failing to find that the Small Claims Court lacked jurisdiction to hear and determine the matter and therefore down its tools.
 2. The learned Adjudicator erred in law in failing to find that the matter before the Small Claims Court was not only *res judicata* but also *sub judice* Milimani CMCC No 263 of 2019 Derex Xavier Mayabi v Nkugwe Investments & Limited Villa Care Limited.
 3. The learned Adjudicator erred in law by arriving at a conclusion that Milimani CMCC No 263 of 2019 Derex Xavier Mayabi v Nkugwe Investments & Limited Villa Care Limited had been withdrawn without proof to this effect.
 4. The learned Adjudicator erred in law by failing to appreciate that once judgment had been delivered in Milimani CMCC No 263 of 2019 Derex Xavier Mayabi v Nkugwe Investments & Limited Villa Care Limited, the same had been decided by the Chief Magistrate and suit brought before the Small Claims Court was, therefore, *res judicata* in so far as the same relates to the same subject matter and purports to raise the same issues as previously decided.
9. The appellant therefore seeks that ;
 1. This Court allows the appeal and sets aside the ruling delivered Hon J W Munene delivered on September 8, 2022.
 2. This Court finds and holds that the Small Claims Court lacks jurisdiction to hear and determine issues raised in Small Claims Court Claim No E4305 of 2022 Derex Xavier Mayabi v Nkugwe Investments & Limited Villa Care Limited.
 3. This Court finds and holds that the Small Claims Court Claim No E4305 of 2022 Derex Xavier Mayabi v Nkugwe Investments & Limited Villa Care Limited is *res judicata* Milimani CMCC No 263 of 2019 and therefore ought to be struck out.
 4. In the alternative, this Court finds and holds that the Small Claims Court Claim No E4305 of 2022 Derex Xavier Mayabi v Nkugwe Investments & Limited Villa Care Limited is *sub judice* Milimani CMCC No 263 of 2019 and therefore ought to be struck out.
 5. The 1st Respondent be ordered to pay costs of this appeal and the Small Claims Court Claim No E4305 of 2022 Derex Xavier Mayabi v Nkugwe Investments & Limited Villa Care Limited.
10. Simultaneously, the Appellant filed an application for stay of proceedings in the Small Claims Court pending hearing and determination of the Appeal. The Court adopted consent filed on November 23, 2022 for stay of proceedings , and the Court admitted the appeal for hearing . It also directed the parties to file and exchange submissions as a way of disposing off the appeal.
11. When this matter was placed before the Deputy Registrar, counsel for the 1st Respondent intimated that his application dated December 7, 2022 was still pending before the Judge and sought that it be prioritised. That application was brought under a certificate of urgency seeking that the proceedings and any orders dated November 24, 2022 issued by Hon Justice Mshila be set aside and the 1st Respondent be allowed to participate in the appeal. That the Court be pleased to recommend that the Law Society of Kenya take disciplinary action against the firm of Herman Omoti and Tony Ogwaka Nyamagwa advocates for the Appellant and the 2nd Respondent respectively and the costs be provided



for. Its main ground was that said order was issued by consent of the Appellant and the 2nd Respondent to the detriment of the 1st Respondent.

12. On the other hand, counsel for the Appellant urged the court to proceed with the appeal which touched on jurisdiction of the Small Claims Court. The Deputy Registrar directed that the matter be placed before the Judge for directions. Indeed, parties appeared before this Court on January 18, 2023 and after hearing the parties on the issue directed that that orders (November 24, 2022) as regards the hearing of the Appeal remain.
13. The parties before Hon Justice Mshila on November 24, 2022 had consented that there be a stay of proceedings before the Small Claims Court as per the consent letter dated November 8, 2022. That letter bearing the consent is however filed on November 23, 2022 but the contents were stay of proceedings before the Small Claims Court. They agreed to file submissions.
14. On January 19, 2023, both the Appellant and the 1st Respondent had complied and they relied on their submissions. The 2nd Respondent relied on submissions by the Appellant. Subsequently, the 1st Respondent filed a notice of withdrawal dated February 7, 2023 withdrawing the Application dated December 7, 2022 with no orders as to costs.

SUBMISSIONS

15. In their submissions dated August 15, 2022, counsel for the Appellant referred to the background of the matter and Record of Appeal before listing two issues for determination by this Court that is;
 1. Whether the suit in the Small Claims Court Claim No. E4305 of 2022 Derex Xavier Mayabi v Nkugwe Investments & Limited Villa Care Limited is *res judicata* Milimani CMCC No 263 of 2019.
 2. Whether the Small Claims Court has jurisdiction to hear and determine the issues raised in the Small Claims Court Claim No E4305 of 2022.
16. Counsel submits that the 1st Respondent sought to terminate the contract entered into between the Appellant and the 1st Respondent for the sale of three bedroomed apartments situated at Ruby Flats on LR No Block 209/10722 /88 Block A Unit A5 Villa Care Limited and filed a suit against the Appellant and the 2nd Respondent in Milimani CMCC No. 263 of 2019.
17. That it was apparent the Defendants did file the defence and after filing a memorandum of appearance and consequently, the Plaintiff therein sought entry of default judgment which was done. A decree was issued on March 10, 2019. However, the decree was not executed but the 1st Respondent filed an application for the Directors of the Appellant to show the Assets of the Appellant.
18. That the application has not been concluded. Despite there being a judgment, the 1st Respondent went ahead and filed Small Claims Court Claim No E4305 of 2022 involving the same parties and on the same subject matter causing the Appellant to raise a preliminary objection the subject of this appeal. He submits the matter before the Small Claims Court is therefore re judicata. He cites among others, the case of *Mugo Ndegwa v James Nderitu Githae* [2010] eKLR on what constitutes *res judicata*.
19. On whether the Small Claims Court has jurisdiction to hear Small Claims Court Claim No E4305 of 2022, counsel submits that jurisdiction goes to the root of the matter and while relying on Section 12 and 13 of the Small Claims Court, counsel submits that the Small Claims court does not have jurisdiction to hear and determine issues relating to land of contracts, choses in action or other instruments granting any enforceable interest in land.



20. On the other hand , Counsel for the 1st Respondent submits that the matter in Milimani Chief Magistrate’s Court Case No 263 of 2019 is not active having been withdrawn pursuant to the Notice of Withdrawal dated July 14, 2022 and therefore it ceased to exist. That as a consequence, the matter is not *res judicata* as the issues in Milimani Chief Magistrates Court Case No 263 of 2019 have never been determined.

Determination

21. On whether the Small Claims Court had jurisdiction to hear the matter, Section 12 of the [Small Claims Court](#) provide that:

Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to-

- a. Contract for sale and supply of goods or services.
- b. Contract relating to money held and received.
- c. Liability in tort in respect of loss or damage caused to any property or for the delivery of or recovery of movable property;
- d. Compensation for injuries; and,
- e. Set -off and counterclaim.
 1. Further, Section 13 of the Act provides that a claim shall not be brought before the court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over title to or possession of land or employment and labour relations.
 2. Having heard the parties in this appeal, it is clear that the claim before the small Claims Court arises from a contract that fell foul. Even if the Claimant was not seeking specific performance but a refund of the money that he deposited pursuant to a contract that he opted to cancel, the issue that the Small Claims Court would have gone into the issue as to whether the 1st Respondent had a good title to pass to the Appellant. It would also have delved into the issue as to whether the 1st Respondent was entitled to rescind the contract and get the refund. That would have gone beyond its jurisdiction under section 13 of the Small Claims Court and saying that the Small Claims Court.
 3. The annextures in the record of appeal show that indeed there was a case in Milimani being CMCC No 263 of 2019 between the same parties and a judgment was entered therein and a decree issued. As a consequence, the Small Claims Court Claim No. E4305 of 2022 is *res judicata* within the meaning of Section 7 of the [Civil Procedure Act](#) and should have been struck out.
 4. The dispute in the Small Claims Court Claim No E4305 of 2022 was not only *res judicata* but also outside the jurisdiction of the Small Claims Court. The appeal therefore succeeds. The Appellant is awarded costs of the small claims court and this appeal.

- 22 Orders accordingly

DATED,SIGNED AND DELIVERED VIRTUALLY AT KISII THIS 31ST DAY OF MAY, 2023.

PATRICIA GICHOHI



JUDGE

In the presence of:

Mr Omuti for Mr Shadrack Wambui for Appellant

N/A for 1st Respondent

N/A for 2nd Respondent

Kevin Isindu, Court Assistant

