



REPUBLIC OF KENYA



KENYA LAW
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Green Gardens Management Company Ltd & 2 others v Kavei & 4 others (Civil Case E187 of 2022) [2023] KEHC 18012 (KLR) (Civ) (24 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18012 (KLR)

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

CIVIL

CIVIL CASE E187 OF 2022

AA VISRAM, J

MAY 24, 2023

BETWEEN

GREEN GARDENS MANAGEMENT COMPANY LTD 1ST PLAINTIFF

REUBEN CHERES 2ND PLAINTIFF

CHARLES RIGORO 3RD PLAINTIFF

AND

PHILIP W KAVEI 1ST DEFENDANT

LUTHER ANUKUR 2ND DEFENDANT

ALIA MOHAMMED ALI 3RD DEFENDANT

ELIZABETH JUMA 4TH DEFENDANT

JULIE LUSIKE NABWERA 5TH DEFENDANT

RULING

1. This ruling relates to the plaintiffs' preliminary objection dated March 20, 2023 ("the P.O") against the defendants' application dated February 13, 2023, seeking that the same be dismissed with costs on the grounds that:-
 - i. The Honourable court lacks substantive jurisdiction to entertain the instant application.
 - ii. The application offends the express provisions of section 12(1) (a) and 12(2) of the *Employment and Labour Relations Court Act*, 2011.
 - iii. That the instant application is misconceived, gravely incompetent, frivolous, and an abuse of the court process and ought to be struck out forthwith with costs to the respondent.



2. The defendant's application dated February 13, 2023, seeks the following orders:-
- i. Spent.
 - ii. That reliance protection, the alleged security firm be joined in these proceedings as these proceedings as the proposed third party/respondent for the purpose of the instant application by the defendants.
 - iii. Spent.
 - iv. That pending the hearing and determination of the suit this Honourable Court be pleased to restrain the 2nd and 3rd Plaintiffs whether by themselves ,their employees ,assignees and/ or agents from utilizing ,interfering ,alienating or in any way dealing with the 1st Plaintiff's resources and in any way interfering or dealing with the 1st Plaintiff Cooperative bank fixed account numbers 0XXX,0XXX and 0XXX or any other bank account of the of the 1st Plaintiff unless authorized by this Honourable Court.
 - v. Spent.
 - vi. That pending the hearing and determination of this suit this Honourable Court be pleased to issue an injunction to restrain the 2nd and 3rd Plaintiffs whether themselves, their employees, assignees and/or agents from terminating the services of the 1st Plaintiff caretaker, Wellington Wenzi Nguli and security services provider, Kong security services and/or in any manner representing themselves as agents of the 1st Plaintiff or dealing with any of the 1st Plaintiff service providers.
 - vii. Spent.
 - viii. That pending the hearing and determination of the suit this honourable court be pleased to restrain the proposed third party whether by itself ,its employees ,assignees and/or agents from accessing, interfering ,alienating ,transferring ,trespassing ,remaining or in any way however dealing with the 1st Plaintiff property located in all that Land known as L.R No.330/49 or any other property of the 1st Plaintiff.
 - ix. Spent.
 - x. That pending the hearing and determination of the suit this Honourable Court be pleased to restrain the 2nd & 3rd Plaintiff whether by themselves, their employees, assignees and/or agents from receiving, collecting, revising or in any way dealing with the service charge paid by the residents of the subject property to the 1st Plaintiff.
 - xi. That pending the hearing and determination of the suit this Honourable Court be pleased to compel the 2nd and 3rd Plaintiff to account for the Kshs. 4,600,000/= being 1st Plaintiff members share capital and Kshs. 799,760/= applied to irregular and unauthorized purchase of CCTV cameras and firefighter's equipment.
 - xii. That the Defendant be at liberty to apply for such further orders and/or directions as this Honourable Court deem just and fit to grant.
 - xiii. That Costs occasioned by this application be borne by the Plaintiffs.
3. This court gave directions that the preliminary objection be dispensed by way of written submissions. The Plaintiffs and the Defendants both filed their submissions dated March 27, 2023 and March 24, 2023 respectively.



4. Counsel for the Plaintiffs submitted that what is being sought is an injunction restraining the 2nd and 3rd Respondents from terminating the services of the 1st Plaintiff's caretaker, Wellington Wenzi Nguli, who has already been sent into retirement by the 1st Plaintiff upon attaining the retirement age.
5. The Plaintiffs submitted that Mr. Nguli, the former caretaker of the first Plaintiff, has already retired, and is not a party to these proceedings. The question of whether or not the decision to retire him was irregular is a matter to be determined by the Employment and Labour Relations Court.
6. In opposition to the Preliminary Objection, counsel for Defendants submitted that the present matter does not disclose an employer-employee relationship between the parties. The crux of the proceedings is about control and management of the 1st Plaintiff's company.
7. The defendants cited the decision of the Court of Appeal in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* (Civil appeal 656 of 2022) 2023 KECA 80 (KLR) in which the court drew a distinction between the central issue of law to the dispute and matters that are incidental to the same in the following terms:-

“The ELRC failed to appreciate that a claim questioning constitutional validity of a statutory provision was not merely an ancillary claim to the issue before it, nor did the issue arise during the adjudication of the dispute (which in any event was not an employer-employee dispute). The germane issue which was identified by the court as early as at paragraph one of its judgment was a substantive claim brought under article 165(3)(d)(i) of the *Constitution*. The ELRC failed to appreciate that jurisdiction was determined on the basis of pleadings before consideration of the substantive merits of the case. The petitions challenged the constitutional validity of the legislative process leading to enactment of a legislation and or some of its provisions. The instant matter was not an employer-employee dispute. The ELRC failed to appreciate that laws affected many things in a variety of ways, large and small, but those side winds did not determine what matter a law was in relation to. That was determined by analyzing the central focus of the law, what it was really all about.

8. The Defendants further relied on case of *Caren Chepchumba Limo (Suing as personal Representative of the Estate of Stephen Nalinya Ndiwa (deceased) v Jemi Freights Limited & another* (2018) eKLR, where the Court emphasized the rationale that courts ought not split causes of action on the basis that doing so would create ambiguity in dispute resolution in the following terms:-

‘We need not belabor this. This court is not required to dissect claims made before it with a view to dispersing the separate units to their seemingly respective jurisdictions. This would be fool handy and doubtlessly create extensive confusion in dispute resolution mechanisms touching on the court.’

Analysis and determination.

9. I have considered the rival submissions of the parties. The issue is whether this court has the relevant jurisdiction to entertain the Defendants' application dated February 13, 2023 (“the Application”).
10. An objection on the ground that a court has no jurisdiction is ordinarily a pure point of law subject to the test in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, where the court held as follows:-

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of



the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

At page 701 Sir Charles Newbold, P added:-

“...A preliminary objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion.” (Emphasis mine)

11. For a Preliminary Objection to succeed, the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.
12. Here, the key ground of the preliminary objection is about the jurisdiction of this court to entertain the dispute. The question is whether the dispute falls outside this court’s jurisdictional purview as donated by article 165 of the *Constitution*, and within the purview of the Employment and Labour Relations Court (ELRC) as donated by article 162 of the *Constitution* and section 12 (1) (a) and 12 (2) of the *Employment and Labour Relations Court Act*.
13. Article 162 (2) (b) of the *Constitution* provides thus:-
 162. System of courts
 1. The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - a) employment and labour relations; and
 - b) the environment and the use and occupation of, and title to, land.
 3. Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2). (emphasis mine)
 4. The subordinate courts are the courts established under article 169, or by Parliament in accordance with that article.
14. Having considered the law as stated above, and looking at the application within the context of the pleadings, in particular, the plaint; defence; and counter-claim, it is evident to me that the 1st plaintiff, Management Company, is a corporation established pursuant to the *Sectional Properties Act*, 2020 (“the Act”).
15. To my mind, such a corporation is different from a company incorporated pursuant to the *Companies Act*. I say this because looking at the Act, it is evident that Parliament intended such corporations to be governed and regulated by the Act and by-laws specified in its regulations rather than by the *Companies Act*. In this regard, section 17 of the Act reads as follows in respect of the make-up of such a corporation and its regulation:-

“ 17. Establishment of a Corporation



- (1) On the registration of a sectional plan, there shall be constituted a Corporation under the name "The Owners, Sectional Plan No. (the number to be specified being the number given to the plan on registration)".
- (2) The Registrar shall issue a certificate of registration of the corporation.
- (3) A Corporation shall consist of all those persons —
 - (a) who are the owners of units in the parcel to which the sectional plan relates; or
 - (b) who are entitled to the parcel when the sectional arrangement is terminated under this Act.
- (4) The Corporation shall have perpetual succession and a common seal.
- (5) The Corporation shall be regulated in accordance with this Act and the by-laws specified in the regulations shall subject thereto, have effect in relation to the corporation and its board. (emphasis mine)
- (6) The provisions of the [Companies Act, 2015](#) (No. 17 of 2015) shall not apply to the Corporation. (emphasis mine)

16. Based on a reading of the above, it is evident that such a corporation is unique in so far as it has been established with a particular purpose and objective in mind. Part 3 of the Act provides further and detailed provisions relating to *inter-alia* the establishment of a corporation under the Act. It sets out the various permissible actions that may be taken by such a corporation; states the various duties of the corporation; and goes on to provide provisions relating to the establishment of a board of management of the corporation, including provisions relating to convening meetings, and the enforcement of the by-laws of the corporation. Importantly, the Act also provides for an internal dispute resolution mechanism relating to and concerning disputes arising out the provisions of the Act, with further recourse to the court, in the event the same is unsuccessful.

17. Of particular note is section 3 of the Act, which defines the appropriate court contemplated in the Act. It provides as follows:-

“Court” means the Environment and Land Court established under the [Environment and Land Court Act, 2011](#) (No. 19 of 2011).”

18. Of further note is the definition of a “board” under the Act, which is defined as:-

“board” means the board of a Corporation as provided for in section 26.”

19. Section 26 of the Act referred to above states as follows:-

“26. Board of management

- (1) A Corporation shall have a board of management that shall be constituted as provided by the by-laws of the Corporation.”



- 20. Based on the above, it is clear to me that a Corporation created pursuant to the provisions of the Act, is subject to the jurisdiction of the Environment and Land Court (“ELC”). Further, that the Act requires parties to first pursue an internal dispute resolution mechanism, in some instance before recourse to the court.
- 21. Finally, looking at the Application within the context of the pleadings as stated above, I would agree with the defendants that the crux of the issue before this court relates to the “running and control of the 1st plaintiff”, rather than the ancillary issues relating to the termination of the Plaintiff’s caretaker and termination of services of the security service provider. I am in further agreement that courts ought to dissect and split causes of action across various courts. But this court was not intended by parliament to determine issues relating to the running and control of a Sectional Properties Corporation. Sections 29, 30 (6), and (7) are some of the provisions of the Act which read as follows in relation to running and control of the corporation, and the instances in which a party may resort to the ELC:-

“29 By-laws of the Corporation

(1) The Corporation may make by-laws to provide for the control, management and administration of the units, the movable and immovable property of the Corporation and the common property and for establishment of a Committee.”

“Section 30

(6) In the event of non-compliance with an order of a Committee the aggrieved party may apply to the Court to enforce the order of the Committee.(emphasis mine)

(7) If a party is dissatisfied with the determination of a Committee under this section, the party may appeal to the Court.”(emphasis mine)

- 22. Based on the reasons as set out above, I am satisfied that the ELC and not this court is vested with jurisdiction to hear and determine the present dispute.
- 23. Having found the above, it is trite that a court without jurisdiction cannot take a single further step.
- 24. Accordingly, based on the reasons set out above, I find and hold that the entire suit, together with the defence and counter-claim, and all applications arising therefrom are incompetently before this court. The same are hereby struck out.
- 25. Having struck out the suit and the counter-claim based on the above reasons, I find it appropriate to make no orders as to costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF MAY 2023

ALEEM VISRAM

JUDGE

In the presence of;

..... for the Plaintiff

..... for the Defendant

