



REPUBLIC OF KENYA



Baraka Parking Agencies Limited v Forward Travellers Sacco (Miscellaneous Application E834 of 2022) [2023] KEHC 23014 (KLR) (Commercial and Tax) (24 August 2023) (Ruling)

Neutral citation: [2023] KEHC 23014 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E834 OF 2022
DO CHEPKWONY, J
AUGUST 24, 2023**

BETWEEN

BARAKA PARKING AGENCIES LIMITED APPLICANT

AND

FORWARD TRAVELLERS SACCO RESPONDENT

RULING

1. The Applicant filed the Notice of Motion application dated 23rd November, 2022 seeking the following orders:
 - a. Spent;
 - b. That this Honourable Court be pleased to issue orders of temporary injunction restraining the Respondent, its agents, servants and/or representatives from evicting the Applicant from the suit premises known as LR No 209/21524 [1R 169028] situated in the county of Nairobi near Wakulima Market, or pilfering, destroying, attaching and/or selling by public auction the Applicant's goods and/or assets and/or adversely interfering with the Applicant's quiet and peaceful possession of the suit premises pending the hearing and determination of this application.
 - c. That this Honourable Court be pleased to issue orders of temporary injunction restraining the Respondent, its agents, servants and/or representatives from evicting the Applicant from the suit premises known as LR No 209/21524 [1R 169028] situated in the County of Nairobi near Wakulima Market, or pilfering, destroying, attaching and/or selling by public auction the Applicant's goods and/or assets and/or adversely interfering with the Applicant's quiet and peaceful possession of the suit premises pending the hearing and determination of Arbitral



proceedings between the two parties herein currently pending hearing and determination before Arbitrator, Kethi D. Kilonzo.

- d. That the Honourable Court be pleased to order the reinstatement of the Applicant back to the suit premises and direct the Respondent to return the Applicant's goods illegally and unlawfully removed from the suit premises on 23rd November, 2022.
 - e. That the Honourable Court be pleased to direct the Officer Commanding Kamukunji Police Station to supervise the enforcement of the orders issued herein.
 - f. That the Honourable Court be pleased to issue any other orders that it deems necessary to issue under the circumstances of this case.
 - g. That the Respondent be condemned to pay the costs of this Application.
2. Upon being served with the Application, the Respondent filed a Notice of Preliminary Objection dated 14th December, 2022 citing the following grounds:
 - a. That the application offends article 165 (5) of the Constitution of Kenya, 2010 and section 13 (2) of the Environment and Land Court Act.
 - b. This court lacks jurisdiction to hear and determine the application dated 23rd November, 2022.
 - c. That the Applicant's application is fatally defective beyond curative remedy.
 3. This court will start with considering the merits of the Notice of the Preliminary Objection since it has the effect of disposing off the entire application and suit if it is successful. The same has been disposed off by way of written submissions filed by the Applicant dated 13th February, 2023 and the Respondent's which are dated 31st January, 2023.
 4. According to the Respondent, this court does not have jurisdiction to deal with the application since the issues raised therein touch on the environment and land and therefore it should down its tools, allow the Notice of Preliminary Objection and dismiss the application.
 5. On its part, the Applicant holds that it entered into a 15-year lease agreement dated 8th June, 2021 over the suit premises known as LR 209/21524. According to the Applicant, a dispute arose and was referred to arbitration pursuant to Clause 8 of the said lease agreement and is pending determination. It holds that the Respondent instructed auctioneers to levy distress and recover rent arrears which was the subject of the arbitration proceedings. It therefore moved to this court to seek intervention so as to restrain the Respondent from adversely interfering with its quiet possession pending the hearing and determination of the arbitral proceedings.
 6. The Applicant argues that the reliefs sought in the application are not for substantive orders in respect of the ownership of the suit premises but for interim reliefs under section 7 of the Arbitration Act. According to the Applicant the Environment and Land Court is not a High Court *per se* but a court with the status of a High Court and therefore the appropriate court under the Arbitration Act is the High Court, and hence this court is clothed with jurisdiction to handle the matter.

Analysis and Determination

7. From the onset, it is always important for a court to establish whether it has jurisdiction to deal with an application our suit since without jurisdiction a court can only down its tools. This was the court's



decision in the classic case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) KLR 1 where it was stated that: -

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

8. It is trite law that jurisdiction of the court flows from either the *Constitution* or a statute or both. This was the decision of the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others*, Application No.2 of 2011, where it pronounced that:

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...”

9. On the face of the application, the subject matter being sought are interim injunctive orders over the subject property pending the hearing and determination of the arbitral proceedings, which proceedings are with regard to a lease agreement over premises known as LR No209/21524 [IR 169028]. The court being a High Court established under article of the *Constitution*, does not have jurisdiction to handle land and environment matters which is a preserve of the Environment and Land Court established under article 162 of the *Constitution*.

10. It is trite law that all disputes relating to environment and land are only dealt with by the Environment and Land Court. Section 13 (2)(e) of the *Environment and Land Court Act* outlines the jurisdiction of the Environment and Land Courts as follows: -

(1) ...

(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, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
- b) relating to compulsory acquisition 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 interest in land; and
- e) Any other dispute relating to environment and land.

11. In this case, the Applicant has brought the case pursuant to the provisions of section 7 of the *Arbitration Act* which states:-

“(1) It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

(2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the



application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.”

12. It is common ground that the High Court has powers to grant interim reliefs pending arbitral proceedings as provided under section 7 of the *Arbitration Act* as stated above. This was the determination of the court in the case of *Alison Jean Louis v Rama Homes Ltd* [2020] eKLR, where the Court stated as hereunder;

1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.

The Law grants an Applicant an opportunity to apply to the Court to grant interim orders to preserve the subject matter and/or maintain status quo so as to ensure that there is a dispute for hearing and determination before the Arbitrator.

The interim orders envisaged are in form of injunctions, deposit and/or holding of funds and any other relevant and legal interim order to freeze/stop/ remain as is situation so as to enable parties pursue Arbitration proceedings. In fact, once Arbitration proceedings commence, the Arbitrator on hearing the dispute may amend, set aside and/or enforce and maintain the interim order.

13. However, it is worth-noting that the *Arbitration Act* was passed before the promulgation of the *Constitution* of Kenya, 2010 which saw the establishment of other courts such as the Environment and Land Court as well as the Employment and Labour Relations Court which are courts of equal status to the High Court. It therefore follows that the High court was relieved of jurisdiction to deal with issues relating to land matters.

14. The court in the case of *Gurvir Bhabra & another v John Malogo Ndiritu* [2021] eKLR dealt with the issue jurisdiction of the Environment and Land Court dealing with section 7 of *Arbitration Act* and held:-

“ 24. It is apparent that the said provision of the Law only speaks to the High Court and not otherwise and in this regard the question then arises, whether the Environment and Land Court, is seized of similar powers and/or mandate, as pertains to matters that fall under the exclusive jurisdiction of the said court, in line of article 162 (2) (b) of the *Constitution*,2010.

25. It is imperative to note that the *Arbitration Act* 1995, was enacted prior to and/or before the Promulgation of the *Constitution* of Kenya, 2010 and at the time of the enactment of the said *Act*, the Superior court that had original and unlimited jurisdiction was the High Court. For clarity, the High court was vested with powers to handle and/or adjudicate upon all Civil Disputes, Environment and land matters, not excepted.

26. However, upon the enactment of the *Constitution* 2010, there was created the Environment and Land Court and same was conferred with specific and dilienated jurisdiction in line with article 162 (2) (b) of the *Constitution*, 2010, which provides as hereunder;

System of courts.

162.



- (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.

27. . It is worthy to note that the subject Dispute touches on and/or concerns a Tenancy Relationship and/or ownership rights over and in respect of the property known as LR No 209/7153/42, hereinafter referred to as the suit property.

28. Being a matter that touches on and/or concerns a claim over and in respect of title to, occupation of and use of land, the subject matter therefore falls within the exclusive jurisdiction of the Environment and Land court. See section 13(7) of the *Environment and Land Court Act*, 2011. (Emphasis added)”

15. Since this case, the subject matter in this case relates to lease agreement and quiet possession of the suit property which is within the confines of the *Environment and Land Act*, the competent court to address the issues raised herein is the Environment and Land Court. And in the eventuality that there lies a right of appeal over the arbitral proceedings award, then the appeal would lie with the Environment and Land Court for redress. Therefore, that is the appropriate court to address the issues herein.

16. In the circumstances, the Notice of Preliminary Objection is hereby allowed, a result of which this court downs its tools for want of jurisdiction. Consequently, the Notice of Motion application dated 23rd November, 2022 is hereby dismissed.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS ...24TH ... DAY OF ...AUGUST..., 2023.

D.O CHEPKWONY

JUDGE

