



Kenya Power & Lighting Limited v Keyser Investment Limited (Civil Appeal E004 of 2021) [2023] KEHC 21545 (KLR) (Appeals) (18 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21545 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
APPEALS
CIVIL APPEAL E004 OF 2021
AN ONGERI, J
AUGUST 18, 2023**

BETWEEN

KENYA POWER & LIGHTING LIMITED APPELLANT

AND

KEYSER INVESTMENT LIMITED RESPONDENT

(Being an appeal from the judgment and decree of Hon. K. I. KIVUTI (SRM) in Milimani CMCC no. 486 of 2020 delivered on 27/11/2020)

JUDGMENT

1. This appeal is against the order of the trial court made on 27/11/2020 which dismissed the appellant notice of preliminary objection dated 8/9/2020
2. The Appellant filed a memorandum of appeal dated 18/11 2020 based on the following grounds;
 - a. That the Trial magistrate completely misapprehended the principles governing preliminary objections thereby arriving at an erroneous decision and concluding that the preliminary objection dated 8/9/2020 was *res judicata*.
 - b. That the Trial magistrate erred in law and in fact by entertaining issues of fact while making a determination on the preliminary objection.
 - c. That the Trial magistrate did not appreciate that there were two aspects of the preliminary objection.
 - d. That the fact that the Tribunal was not sitting would not confer jurisdiction on the magistrate's court.
 - e. That the Trial court considered irrelevant factors in arriving at its decision.



3. The parties filed written submissions which I have considered. The appellant submitted that it filed a Preliminary Objection dated 13/2/2020 where it argued that there existed under the [Energy Act, 2019](#), the Energy and Petroleum Tribunal established which under Section 36, had the Jurisdiction to handle the matters raised by the Respondent in his Complaint and the Magistrates Court in dismissing the said Preliminary Objection held that the Tribunal had the Jurisdiction to handle such matters but since it was not operational and or constituted, the lower Court gave itself jurisdiction to handle the matter and proceeded to grant the Respondent orders.
4. The Appellant being dissatisfied with the Ruling on the Court having granted itself Jurisdiction, raised another Preliminary Objection dated 8/9/2020 and amongst the issues the Objection raised was that the Magistrates Court lacked unlimited original Jurisdiction as envisaged in the [Constitution](#) under Article 165(3) and Article 169(d) to determine the matters before it and it was only the High Court which is blessed with the said unlimited Original Jurisdiction to handle matters where there appears to be a “*lacuna*” noting that the Lower Court then in its two Rulings dated 1/9/2020 and 1/11/2020 appreciated that there existed the Energy and Petroleum Tribunal that had the jurisdiction to handle the matter in the first instance.
5. The appellant argued that the Lower Court having noted that there existed such a Tribunal should have not entertained the Suit and he should have downed his tools and in support cited in the case of [Shalimar Limited v Kenya Power & Lighting Company Limited](#) [2020] eKLR where the Court observed that

“where there is a clear procedure for the redress of any particular grievance prescribed by the [Constitution](#) or an Act of Parliament, that procedure should be strictly followed.”
6. The appellant further submitted that Preliminary Objection dated 13/2/2020 is completely different from the Preliminary Objection dated 8/9/2020 and therefore the Lower Court erred in its decision that the Preliminary Objection dated 8/9/2020 was *res judicata* noting that the Sections quoted in the two Preliminary Objections are different.
7. The respondent alternatively submitted that the Appeal is bad in law to the extent that it was filed without leave in contravention of Order 43 Rule 2 of the [Civil Procedure Rules](#) and the Record of Appeal as well as the Supplementary Record of Appeal have omitted key and mandatory documents in contravention of Order 43 Rule 13. Further the Order appealed from as produced with the Supplementary Record of Appeal is not certified in breach of the express mandatory provisions of Order 42 Rule 2.
8. The respondent submitted further that the record of appeal and the supplementary record lack complete typed proceedings, the order granting leave to appeal and key pleadings are missing. The respondent argued that the actions by the appellant were deliberate as they were given multiple opportunities to cure the incompetency of the record.
9. The issues for determination in this appeal are as follows;
 - a. Whether Trial court misapprehended the principles governing preliminary objections and erroneously concluded that the preliminary objection dated 8/9/2020 was *res judicata*.
 - b. Whether the Trial court lacked jurisdiction to hear the matter.
 - c. Whether the appeal herein is competent.



10. On the issue as to whether Trial court misapprehended the principles governing preliminary objections and erroneously concluded that the preliminary objection dated 8/9/2020 was *res judicata*, I find that the appellant filed a Preliminary Objection dated 13/2/2020 where it argued that there existed under the [Energy Act, 2019](#), the Energy and Petroleum Tribunal established which under Section 36 which had the Jurisdiction to handle the matters raised by the Respondent in his Pleint.
11. The Trial Court in dismissing the said Preliminary Objection held that the Tribunal had the Jurisdiction to handle such matters but since it was not operational and or constituted, the Trial court had jurisdiction to handle the matter proceeded to grant the Respondent orders.
12. The Appellant did not appeal against that ruling but instead raised another Preliminary Objection dated 8/9/2020 and amongst the issues raised in the second preliminary Objection was that the Trial Court lacked unlimited original Jurisdiction as envisaged in the [Constitution](#) under Article 165(3) and Article 169(d) to determine the matters before it and it was only the High Court which is blessed with the said unlimited Original Jurisdiction to handle matters where there appears to be a “*lacuna*” in the law.
13. I find that the second preliminary objection dated 8/9/2020 was *res judicata* as far as the issue of the jurisdiction of the Trial court was concerned since the said issue had been raised in the preliminary objection dated 13/2/2020 and the Trial court had made a determination that it had jurisdiction.
14. In the case of [John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others](#) [2015] eKLR stated as follows on the issue of *res judicata*;

“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without *res judicata*, the very essence of the rule of law would be in danger of unraveling uncontrollably.”
15. On the issue as to whether the Trial court lacked jurisdiction to hear the matter, I find that the Trial court stated the Tribunal was not operational and or constituted at the time the claim was filed and therefore the Trial court had the jurisdiction to handle the matter.
16. In the case of The [Owners of Motor Vessel Lillian “S” vs Caltex Oil Kenya, Ltd](#) (1989) KLR 1 at page 14, the court stated as follows;

“when a court has no jurisdiction, there would be no basis for a confirmation of proceedings pending the 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.”



17. In the case of *Samwel Kamau Macharia and another Vs. Kenya Commercial Bank and 2 others* – (Supreme Court of Kenya Civil Application No. 2 of 2011) (unreported) the Supreme Court had this to say on jurisdiction;

“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus a court of law 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.

Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of the court of law or tribunal the Legislature would be within its authority to prescribe the jurisdiction of such court or tribunal by statute law.”

18. In the current case I find that there is no evidence that the Energy Tribunal was operational and therefore the proper forum was the Chief magistrates' court.
19. On the issue as to whether the appeal herein is competent, I find that it has not been disputed that this is an interlocutory appeal and that the same was filed without leave of the court.
20. The appeal is therefore incompetent and the same is with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 18TH DAY OF AUGUST, 2023.

A. N. ONGERI

JUDGE

