



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E030 OF 2021

WEST AFRICAN FOODSTUFFS CO LTD..1ST APPELLANT/RESPONDENT

MOJIRADE IDAYAT OLAYANJU.....2ND APPELLANT/RESPONDENT

Y.A OLAYANJU.....3RD APPELLANT/RESPONDENT

VERSUS

KAYSER INVESTMENTS LIMITED.....RESPONDENT/APPLICANT

RULING

1. The appellants/applicants filed this appeal on 25th January 2021. They are challenging a ruling by Mr. D.M Kivuti SRM delivered on 19th January 2021. On 28th January 2021 they filed a notice of motion under certificate of urgency seeking orders of stay of execution of the said Ruling. Before the notice of motion could be heard the respondent filed a notice of preliminary objection (P.O) dated 1st February 2021, which is the basis of this Ruling.

2. The respondent in its Preliminary Objection raises the following grounds:

- i) The court does not have jurisdiction over the Appeal.*
- ii) That the Appeal has been filed without requisite leave.*
- iii) The Appeal is otherwise incurably defective and bad in law.*

3. Mr. Ataka for the respondent/applicant submitted that the appellants/respondents did not seek leave to file this appeal as provided for under Order 43 Rule 2 & 3 of the Civil Procedure Rules. He argued that the appellants /respondents had not filed the impugned order or order granting leave as required under Order 42 Rule 13 (4) of the Civil Procedure Rules. He submitted that he was present in the court on 19th January 2021 when the impugned ruling was delivered and no leave was sought by counsel for the appellants/respondents.

4. Counsel while relying on the case of **Trident Insurance Company Ltd Vs Kyalo Musyoka (suing as the personal representative of Purity Mwangeli Mutava (2020) eKLR** urged the court to dismiss the appeal which he says is defective. Further referring to the case of **Colleague Investments Limited Vs KCB Bank Ltd; Nakumatt Holdings Ltd (under Administration) (proposed interested party) {2020} eKLR**. Counsel submitted that the appellants'/respondents' contention that they needed the audio recording is not necessary as the court relies on court proceedings.

5. He also wondered why the respondents had filed the application for stay of execution before this court when a similar application was pending before the lower court. He referred to Order 42 Rule 6 (i) of the Civil Procedure Rules.

6. Finally, Mr. Ataka submitted that the appeal had been filed in the wrong court. He cited section 3 of the ELC Act alongside the case of **Phoenix of E.A Assurance Company Ltd Vs S.M Thiga t/a Newspaper services {2019} eKLR** and contended that this is an Environment and Land Court matter.

7. Mr. Omondi for the appellants/respondents opposed the preliminary objection. He relied on Order 43 Rule 1 (1) (g) (h) and (y) of the Civil Procedure Rules, section 18 Civil Procedure Act and Environment and Lands Court Act No. 19 /11. Referring to the plaint and orders sought he submitted that the suit was on breach of contract and so was a commercial suit. He adds that in the lower court the respondent/applicant obtained an interlocutory Judgement which is not the practice in Environment and Lands Court. His position is that they are before the proper

court. He referred to the cases of:

(i) Winfred Ontube Makori Vs Kenya Electricity Transmission Co. Ltd and another [2020] eKLR

(ii) Trident Insurance Co. Ltd (supra).

8. Counsel while relying on Order 43 Rule 1 (1) (h) (y) of the Civil Procedure Rules argued that the only application filed was for setting aside the default Judgement, and under Order 43 Rule 1 (g) and Order 50 Rule 6 of the Civil Procedure Rules one is allowed to file an appeal as of right.

9. He explained that they sought for the video recording because of the insufficient record which did not cover everything. (Page 224 – 225 of the record of appeal.)

10. In reply Mr. Ataka argued that this matter had been adjourned because the appellants/respondents claimed that they had sought for leave and the record was required. He was surprised that now it was being claimed that leave was not necessary. He asked the court to look at the memorandum of appeal and the grounds of the application. It was his position that leave was required.

Determination.

11. I have considered the preliminary objection raised, the record, the submissions and the authorities cited. The issue for determination is whether the issue raised by the respondent/applicant is a preliminary objection. If it is then the next issue is whether the appellants/respondents have properly moved this court.

12. What then is a preliminary objection? The court of Appeal in the case of **Muiruri Vs Kimemia {2002} eKLR 677** states this:

“A preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

13. Further in **Ngoya and 6 others Vs Attorney General and another {2004} KLR 232** the court held:

“1. A preliminary objection consists of a pure 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. It rises a pure point of law which is argued on 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.

2. The objections to the summons on the grounds of want of jurisdiction on the part of the court and/or want of legal standing on the part of the applicants were true points of preliminary objection within the contemplation of procedural law and they were properly taken.”

14. In this case the respondent/applicant has raised issue with this court’s jurisdiction in dealing with this appeal. He faults the applicants/respondents for failure to seek leave before filing the appeal. Secondly, the appellants/respondents are faulted for filing this appeal in the High Court instead of the Environment and Land court.

15. The issue of jurisdiction is a paramount one. Without jurisdiction the court can’t move. It has to down its tools. The Court of Appeal in the case of **Phoenix of E.A Assurance Co. Ltd (Supra)** expressed itself thus:

*19.” We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989):***

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

16. It went further to state:

*“These words were echoed by this Court in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** in the following words:-*

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would

be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same."

17. The impugned Ruling was given in respect to an oral application by the appellants'/respondents' counsel. Counsel sought for the lifting of the orders freezing the 3rd appellant/respondent's bank accounts pending the hearing and determination of the application dated 17th November, 2020. The oral application was made during cross examination of a deponent in respect to the application dated 17th November 2020 for setting aside the *ex parte* Judgement.

18. I have had a chance of perusing the lower court proceedings (both original and typed) and note that on the date of delivering of the impugned Ruling (19th January 2021) the court did not record anything besides the following:

"Coram: 19/1/2021

Mr. Muindi for the defendant

Mr. Ataka for the Plaintiff/decree holder."

I find this to be a bit odd because even the delivery of the Ruling is not recorded. The record is silent on whether any request for leave to file appeal was made. This court will therefore go by the available record as no video recording was available.

19. In the notice of motion dated 17th November 2020 the 5th prayer is as follows:

*"That the freezing orders issued by this honourable court on 5th October 2020 be lifted, reviewed and/or set aside pending the hearing and determination of this application. It is therefore one of the prayers within the main prayer of setting aside the *ex parte* Judgement.*

20. Order 10 Rule 11 of the Civil Procedure Rules provides"

Rule 11:

"Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

The freezing orders by the trial court are consequential to the Judgement/decree herein.

21. Order 43 of the Civil Procedure Rules deals with appeals from Orders. It lists down Orders from which an appeal shall lie as of right. Order 43 Rule 1 (i) (g) lists Order 10, Rule 11 as one of the Orders which one shall appeal as of right from an Order made there under.

My finding is that the Order freezing the 3rd defendant's bank accounts being consequential to the Judgement and/ or decree then it is an order appealable as of right. Furthermore it was one of the prayers sought in the notice of motion dated 17th November, 2020. The appellants/respondents did not therefore require leave to appeal, against the Order.

22. On whether the appeal should have been filed in the High Court or Environment and Lands Court one only needs to look at the pleadings. The party raising this issue is the respondent/applicant who in fact filed the suit as a commercial one before the Chief Magistrate's Court Milimani.

23. Some of the prayers sought in the plaint are:

a) A declaration that the lease agreement dated 1st November 2017 is repudiated by the Defendant's breach.

b) Vacant possession

c) Rent arrears in the sum of ksh. 1,203,948.00/= as at end of January 2020.

24. The other prayers are resultant from the above mentioned ones. Prayers (a) (b) and (c) touch on a lease agreement in respect of property located on L.R No/1/229 along Argwings Kodhek road which the respondent/applicant wants repudiated. It also claims for vacant possession and rent arrears. These are matters touching on land which should be determined by the Environment and Lands Court. The respondent/applicant should have known that before filing the suit as a Commercial/Civil one.

25. The appellants/respondents were sued by the respondent/applicant. The court of Appeal in the case of **Daniel N. Mugenchi Vs Kenyatta University & 3 others {2013} eKLR** held that:

"And in order to do Justice, in the event where the High Court, the Industrial Court or Environment and Land Court comes

across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization effect the necessary transfer among themselves until such time as the citizenry is well acquainted with the appropriate forum for each kind of claim.”

26. Considering the circumstances of this case I find this to be one such matter which should not be struck out but transferred to the proper court. The main reason is that there are pertinent issues which need to be addressed by the higher court to give guidance to the lower court. I cannot fault the appellants/respondents for filing the appeal before this court since the matter was originally filed as a Commercial/Civil suit before the Chief Magistrate’s Commercial Court Milimani.

27. My finding is that the appellants/respondents did not need leave to file an appeal.

ii) This being a matter whose main claim falls under the Environment and Lands Court, I hereby transfer it to the said Court. It shall be mentioned before the Presiding Judge Environment and Land Court on 14th July 2021 for directions and further orders. Costs in cause.

DELIVERED ONLINE, SIGNED AND DATED THIS 30TH DAY OF JUNE, 2021 IN OPEN COURT AT NAIROBI.

H. I. ONG’UDI

JUDGE