



TEJ Darshan Investment & another v Luma Stores & Supplies Enterprises Limited & another (Environment and Land Appeal 39 of 2018) [2022] KEELC 13330 (KLR) (29 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13330 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 39 OF 2018
SO OKONG'O, J
SEPTEMBER 29, 2022**

BETWEEN

GOPAL KANJI PATEL, RADHA BEN GOPAL PATEL, NAVNET GOPAL ANGHANI, HARSHAD GOPAL SANGHANI (ALL TRADING AS TEJ DARSHAN INVESTMENT) 1ST APPELLANT

GOPAL KANJI PATEL 2ND APPELLANT

AND

LUMA STORES & SUPPLIES ENTERPRISES LIMITED 1ST RESPONDENT

KENYA POWER & LIGHTING COMPANY 2ND RESPONDENT

(An appeal from the Ruling and Order made in the Chief Magistrate's Court at Nairobi in CMCC No.7601 of 2017 by Hon. M. Murage (Ms), Resident Magistrate on 12th July 2018)

JUDGMENT

Background:

1. The appellants instituted a suit in the Chief Magistrate's Court at Nairobi namely, CMCC No 7601 of 2017 (hereinafter referred to only as 'the lower court') by way of a plaint dated October 19, 2017 seeking judgement against the respondents for accrued and unpaid electricity bills and loss of earnings. The appellants' case was that the 1st respondent, a former tenant on the premises owned by the appellants had accrued electricity bills amounting to Kshs 1,163,536.92. The appellants cleared the 1st respondent to vacate the suit premises after the 1st respondent and the 2nd respondent assured the appellants that all the electricity bills had been cleared. The appellants found out after the 1st respondent had vacated the suit premises and the 2nd respondent had disconnected power to the suit premises and adjacent premises owned by the appellants that the 1st respondent had not cleared the bills. Consequently,



the appellants made payments to have electricity reconnected to the adjacent premises while the suit premises remained disconnected leading to loss of earnings. Eventually, the appellants started making payments to the 2nd respondent to have electricity reconnected to the suit premises.

2. The 2nd respondent filed a notice of preliminary objection dated December 7, 2017. It contended among others that the lower court lacked jurisdiction to determine the matter as the suit offended sections 6(1) and 63(1)(l) of the [Energy Act 2012](#) as well as rule 2 and rule 4(a) of the Energy (Complaints and Disputes Resolution) Regulations, 2012. The 2nd respondent's preliminary objection was heard by Hon M Murage (Ms), RM by way of written submissions. The learned magistrate after considering the submissions by both parties made a ruling on July 12, 2018 dismissing the appellants' suit against the 2nd respondent for want of jurisdiction. The learned magistrate noted that the appellants were opposed to the preliminary objection on the ground that the dispute was based on a landlord-tenant relationship in that the 1st respondent left the suit premises without clearing electricity bills. Relying on rule 4(a) of the Energy (Complaint and Dispute Resolution) Regulations of 2012, the learned magistrate found that the suit touched on the issue of supply of electricity which was a matter reserved for the Energy Regulatory Commission. In the learned magistrate's view, the court lacked jurisdiction with regard to the claim against the 2nd respondent. According to the appellants, the learned magistrate's decision split the appellants' suit which arose from the same transaction into two which was against the overriding objectives of the [Civil Procedure Rules](#).
3. The appellants were dissatisfied with the said decision of the lower court and preferred this appeal. In their memorandum of appeal dated August 9, 2018, the appellants challenged the decision of the lower court on the ground that that the learned magistrate erred in upholding the 2nd respondent's preliminary objection that the dispute between the appellants and the 2nd respondent fell within the jurisdiction of the Energy Regulatory Commission.
4. The appellants sought the following reliefs in their memorandum of appeal:
 1. That the appeal be allowed.
 2. That the ruling of the lower court made on July 12, 2018 be set aside and the appellant's suit against the 2nd respondent be reinstated.
 3. The costs of the appeal.

The Appellants' case:

5. The appeal was heard by way of written submissions. The appellants filed their submissions on April 27, 2021. The appellants submitted that the dispute before the lower court concerned a breach of a lease agreement between a landlord and a tenant. The appellants submitted that the value of the subject matter of the suit did not exceed Kshs 5,000,000/- and as such the dispute was within the jurisdiction of the lower court.
6. The appellants submitted that common issues of law and fact arose with regard to the appellants' claim against the 1st respondent and the 2nd respondent since the claims arose from the same transaction. The appellants submitted that the 1st respondent was sued for failing to pay its electricity bills while the claim against the 2nd respondent arose from its act of aiding the 1st respondent to avoid paying the said bills in that the 2nd respondent had initially confirmed to the appellants that the bills incurred by the 1st respondent had been paid only to backtrack later on that assurance after the 1st respondent had vacated the leased premises. The appellants submitted that the 1st and 2nd respondents were jointly and severally liable for the losses occasioned to the appellants. Further, the appellants submitted that



the learned magistrate misconstrued the import of section 63(1)(l) of the *Energy Act* as read with rule 2 and rule 4(a) of the Energy (Complaints and Disputes Resolution) Regulations, 2012 and as a result erred in her finding that the dispute was over electricity supply. The appellants submitted that the said provisions of the Act And Regulations deal with the importation, exportation, generation, transmission, distribution, supply and use of electrical energy. The appellants referred the court to section 5 (a)(I) of the *Energy Act* in this regard. The appellants submitted that rule 4 of the regulations on the other hand deals with billing issues and envisages situations where the bill issued is high or unjustifiable. In view of the foregoing, the appellants submitted that the dispute before the lower court was a landlord and tenant dispute not contemplated under section 5 of the Energy act. The appellants submitted that in any event, they were not challenging the bills issued by the 2nd respondent but the fact that they were unpaid in a scheme that was aided by the 2nd respondent.

7. The appellants invited the court to consider the pre-dominant test in determining the issue of jurisdiction. It was argued that the pre-dominant issue was the failure by the 1st respondent to pay utility bills in breach of the lease agreement. The issue also included fraud and misrepresentation by the 1st respondent with the support of the 2nd respondent. It was submitted that these were matters outside the jurisdiction of the Energy Regulatory Commission. In support of their submissions, the appellants relied on the cases of *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another [2018] eKLR* and *Rasbid Ibrahim & 34 others v Ministry of Lands and Physical Planning & 5 others [2020] eKLR*.
8. The appellants submitted that the learned magistrate erred in finding that the dispute touched on supply of electricity while the appellants were neither complaining about the supply of electricity nor about the bill. The appellants reiterated that they sued the 1st respondent for not paying the electricity bills which was a breach of the lease agreement between the parties while the 2nd respondent was sued for aiding the 1st respondent in obtaining clearance from the appellants to vacate the leased premises leading to the appellants incurring losses. In its defence in the lower court the 1st respondent stated that the bills were paid while the 2nd respondent maintained that they were not paid. It was submitted that it was unfair and unjust to sever the dispute and proceed before the lower court without the 2nd respondent.
9. The appellants submitted further that the learned magistrate should have considered the appellants' application dated February 19, 2018 that was pending before proceeding with the preliminary objection as it touched on the issue of jurisdiction. Additionally, the appellants submitted that the learned magistrate erred in upholding the preliminary objection while the 2nd respondent had not filed a defence. The appellants submitted that the filing of a defence could have led to the determination as to whether any fact needed to be ascertained. The appellants submitted that the dismissal of the case against the 2nd respondent took away their right to sue a defendant against whom they had a case.
10. The appellants urged the court to grant the reliefs sought in their memorandum of appeal. The respondents did not file submissions.

Determination:

11. The definition of a preliminary objection was set out in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd. [1969] EA 696*, where Law JA stated that:

'So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.'



12. In *George Waweru Njuguna v Pauline Chesang Gitau Kamuyu [2017] eKLR* this court stated as follows:

I am in agreement with the plaintiff that the issues raised by the defendant have been wrongly brought before the court by way of a preliminary objection. First, as I have stated earlier in this ruling, the defendant is yet to file a statement of defence to the plaintiff's claim herein. It is clear from the cases cited above that a preliminary objection must arise expressly or by implication from the pleadings. I am of the view that in the absence of a defence on record by the defendant, the defendant's preliminary objection has no basis. Due to the foregoing, it is my finding that the defendant's preliminary objection is premature and has no merit.'

13. It is not disputed that as at the time the 2nd respondent filed a notice of preliminary objection dated December 7, 2017 in the lower court, it had not filed a statement of defence. I am in agreement with the appellants that without a statement of defence, the 2nd defendant's preliminary objection had no basis. A preliminary objection is a point of law which must be pleaded or which arises by implication from the pleadings. The purported points of law which were raised in the 2nd respondent's notice of preliminary objection were not pleaded. The same could also not arise by implication from pleadings as there was no pleading from the 2nd respondent. As I held in *George Waweru Njuguna v Pauline Chesang Gitau Kamuyu (supra)*, a preliminary objection which is not based on a pleading has no foundation. Without a defence by the 2nd respondent there was no way the lower court could have determined the nature of the dispute between the appellants and the 2nd respondent on the basis of which it could establish whether it had jurisdiction to deal with the matter or not.
14. Due to the foregoing, it is my finding that the preliminary objection that was raised by the 2nd respondent in the lower court had no basis and should not have been entertained by the court. In view of that finding, I find it not necessary to consider whether the said objection had merit or not. Such consideration would not be possible without a pleading from the 2nd respondent. It is from pleadings that the court draw issues for determination. It is from those issues that the court would ascertain whether it has jurisdiction on a matter.
15. The upshot of the foregoing is that I find merit in the appellants' appeal. The ruling and orders made by the lower court on July 12, 2018 are set aside and substituted with an order dismissing the 2nd respondent's preliminary objection dated December 7, 2017. Consequently, the appellants' suit against 2nd respondent in the lower court is reinstated. The Deputy Registrar of this court shall return the lower court file to Milimani Commercial Court so that the lower court suit can be heard and determined. The appellants shall have the costs of the appeal.

DELIVERED AND DATED AT NAIROBI THIS 29TH DAY OF SEPTEMBER 2022

S OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms Amolo h/b for Mr George Gilbert for the appellants

N/A for the respondents

Ms Valentine-Court Assistant

