



Ogola v Paragon Electronics Limited & 2 others (Civil Appeal E084 of 2021) [2022] KEELC 3453 (KLR) (2 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3453 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL APPEAL E084 OF 2021
OA ANGOTE, J
JUNE 2, 2022**

BETWEEN

SAMUEL OWUOR OGOLA APPELLANT

AND

PARAGON ELECTRONICS LIMITED 1ST RESPONDENT

REMAX PROPERTY MANAGEMENT LTD 2ND RESPONDENT

BLACK & WHITE SECURITY LIMITED 3RD RESPONDENT

RULING

Background

1. Before this court is the 1st and 2nd Respondents' Notice of Preliminary Objection dated 17th November, 2021 which is premised on the following grounds:
 - a. That this Court being a strictly Land and Environment Court does not have jurisdiction on Appeals to convictions and sentencing arising from contempt proceedings as envisaged under Section 10 (7) of the Magistrates Court Act No 26 of 2015 and further to the decision by the Supreme Court in *Republic vs Karisa Chengo & 2 Others* [2017] eKLR.
 - b. That the suit appealed from is otherwise not an environment and/or land matter.
2. In response, the Appellant swore a Replying Affidavit in which he deponed that a Preliminary Objection cannot be raised if any facts need to be ascertained; that in the instance case, crucial details need to be ascertained being: the nature of the dispute between the parties at the trial court; the interpretation of the application of Section 10 (7) of the *Magistrates' Courts Act* and; whether the 1st & 2nd Respondents had locus standi to institute legal proceeding of any nature without a resolution by the shareholders/lessees of the management company.



3. The Appellant deponed that the 2nd Respondent herein did not have locus standi to institute a suit against him and/or the 3rd Respondent for want of authority and/or resolution from its directorship or shareholders; that he is not a tenant but a lessee with a vote over the administration of the property the subject of controversy between the developer and the 1st Respondent and that the Appeal raises fundamental issues that challenge the jurisdiction of the subordinate court.
4. According to the Appellant, the gravamen of the dispute revolves around the administration of sectional property which this court has jurisdiction to determine and that the subordinate court's assumption of jurisdiction should be reversed ex debito justitiae. It was deponed by the Appellant that the case of Republic vs Karisa Chengo & 2 others (2017) eKLR is inapplicable in the present circumstances as the appellate jurisdiction of this court arises over the appropriation of jurisdiction by the subordinate court over a matter that this court has jurisdiction to entertain.
5. The Appellant deponed that the Preliminary Objection is meant to distract this court from the proper administration of justice and which in itself drags this court into points of facts which is not the intended reason for a preliminary objection and that the appeal has high chances of success for which this court has the jurisdiction to entertain given its authority over disputes emerging out of administration of sectional properties.

Submissions

6. The 1st and 2nd Respondents' counsel submitted that the present Appeal is a criminal appeal having arisen from a contempt application and that the Appellant herein was not a party in the substantive suit and was brought to the proceedings by virtue of being cited for contempt wherein he was found guilty and sentenced to 5 days in prison and in the alternative pay a fine of Kshs 50,000.
7. Counsel submitted that Section 10 (7) of the *Magistrates' Courts Act* states that an Appeal from a contempt application brought thereunder lies as if it were a conviction and sentence made in the ordinary original criminal jurisdiction of court; that as espoused by the Court of Appeal in Republic vs Karisa Chengo, this court does not have jurisdiction over criminal appeals and that the Preliminary Objection meets the requirements of the Mukhisa Biscuit case as it is based on the question of jurisdiction.
8. The Appellant submitted that this court is a creature of Article 162 (2) (b) of *the Constitution* and whose jurisdiction is set out in Section 13 of the *Environment and Land Court Act*; that by dint of Article 162(2) of *the Constitution*, this court has the status of a High Court to exercise supervisory and appellate jurisdiction on matters within its exclusive jurisdiction and that pursuant to Section 26 (3) of the *Environment and Land Court Act* and Section 25(3) of the *Magistrates' Courts Act*, a magistrate must be gazetted to have jurisdiction to handle an environment and land dispute.
9. The Appellant submitted that pursuant to Section 26(4) of the *Environment and Land Court Act*, Appeals of the decisions of those designated magistrates lie in the Environment and Land Court and that it is apparent from the foregoing that once the magistrate has been designated to handle environment and land disputes, the said magistrate is under the supervisory and appellate jurisdiction of the Environment and Land Court.
10. It was submitted that the contention between the Appellant and the Respondents emanate from the use of the phrase "as if it were" as drafted under Section 10(7) of the *Magistrates' Courts Act* which the Respondents have interpreted to mean "shall" thereby leading to the inference that an Appeal from a contempt conviction lies with the criminal court and that such interpretation is untenable as its effect would be to deprive the specialized courts of enforcement mechanisms and further remove this court



from the ambit of Section 5(2) of the *Judicature Act* which is drafted analogously to Section 10 (7) of the *Magistrates' Courts Act*.

11. It was the Appellant's submission that this court ought to adopt the exclusionist definition as adopted in *Telkom Kenya Ltd vs Jeremiah Achila Gogo & Another* [2007] eKLR; that as expressed by the court in *Samuel M. N. Mweru & Others vs National Land Commission & 2 others* [2020] eKLR, a court without contempt power is not a court and that as advised by the Supreme Court in the case of *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others*, Supreme Court Petition No. 26 of 2014 [2014] eKLR a purposive interpretation should be given to statutes so as to reveal the intention of the statute.

Analysis & Determination

12. Having considered the Notice of Preliminary Objection, the Affidavit in response and submissions, the issues that arise for determination are;
 - i. Whether there is a competent Preliminary Objection before the court? and if so,
 - ii. Whether the Preliminary Objection is merited?
13. The threshold of a Preliminary Objection was set out by the Court of Appeal in the locus classicus case of *Mukhisa Biscuits Manufacturing Co. Ltd. vs West End Distributors* (1969) EA 696 at 700 wherein Law, JA stated that:

“...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. 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.”
14. Newbold, P further held as follows:

“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. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”
15. The Supreme Court in the case of *Hassan Ali Joho & Another vs Suleiman Said Shabbal & 2 Others*, Petition No. 10 of 2013, [2014] eKLR re-affirmed the principle as set out in the Mukhisa case and stated as follows:

“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. 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 ... 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’.”



16. The Supreme Court while addressing the position of parties resorting to the use of Preliminary Objections pronounced itself as follows in the case of *Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others* [2015] eKLR:

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

17. The court will examine the Preliminary Objection raised against the aforesaid general guidelines.
18. The crux of the objection herein is that crucial details need to be ascertained being the nature of the dispute between the parties at the trial court; the interpretation of the applicability of Section 10 (7) of the *Magistrates’ Courts Act* and whether or not the 1st & 2nd Respondents had locus standi to institute legal proceeding of any nature without a resolution by the shareholders/lessees of the management company.
19. As to whether the nature of the dispute between the parties at the trial court requires ascertainment of any facts thereby rendering the Preliminary Objection incompetent, the court thinks not. It is undisputed that the subject matter herein is an Appeal arising from the decision of the Magistrate’s court finding the Appellant guilty of contempt of its orders and the subsequent conviction.
20. The nature of the objection is that by virtue of Section 10 (7) of the *Magistrates’ Courts Act*, 2015, this court has no jurisdiction to entertain the Appeal. That being the case, the interpretation of the aforesaid section in as far as it relates to the jurisdiction of this court is warranted.
21. The core issue raised by the objection touches on this court’s jurisdiction. Indeed, the importance of jurisdiction cannot be underscored. As expressed by the Court of Appeal in *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 others* [2013] eKLR;

“So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”

22. In view of the foregoing, the Preliminary Objection is properly before this court.
23. This Appeal arises from the decision of the learned magistrate in Milimani CMCC No 9208 of 2019- Paragon Electronics Limited & Anor vs Black and White Security Limited. In the said case, the magistrate’s court on 13th December, 2019 and 7th October, 2020 ordered the Defendant (the 3rd Respondent herein) and or its agents to grant the Plaintiffs (the 1st and 2nd Respondents herein) and its representatives access to the suit premises being L.R No 330/335 Nairobi County known as Remax Terrace Apartments.



24. The orders of 13th December, 2019 were interim orders pending determination of the application for injunction whereas the orders of 7th October, 2020 were issued pending the determination of the suit.
25. On 19th November, 2020, the Respondents herein filed an application seeking to have the Appellant herein cited for contempt. The foundation of the contempt application was the alleged actions by the Defendant in denying the 1st Respondent's representative, one Benard Okoiti Odityo, access to the suit property. The said denial was said to have been on the instructions of the Appellant herein.
26. After hearing the parties, the learned magistrate found the contempt application merited. The Appellant herein was found guilty of contempt and directed to pay Kshs 50,000 within 7 days failure to which he was to be arrested and committed to civil jail for a period not exceeding 5 days.
27. The aforesaid Ruling triggered the present Appeal to which the 1st and 2nd Respondents filed a Preliminary Objection contending that this court does not have jurisdiction to entertain the same.
28. It is trite that jurisdiction is everything. As succinctly stated by the Court of Appeal in *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd* [1989] eKLR;

“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 judgment is given.”

29. The Supreme Court in *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & others* [2012] eKLR addressing itself to the sources of a court's jurisdiction stated as follows:

“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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... 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 a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

30. According to the Respondents, Section 10 (7) of the *Magistrates' Courts Act* divests this court of its jurisdiction on Appeals with respect to contempt proceedings. According to the Respondents, an Appeal from a contempt application brought thereunder lies as if it were a conviction and sentence made in the ordinary original criminal jurisdiction of court and should be filed in the High Court.
31. Generally, this court's jurisdiction is to be found in Article 162 (2) (b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act*, as well Section 150 of the *Land Act* which grant the court original and appellate jurisdiction to hear and determine all disputes related to the environment and land.



32. Section 10 of the [Magistrates' Courts Act](#) generally empowers the courts to punish for contempt as follows:
- “In the case of civil proceedings, the willful disobedience of any judgment, decree, direction, order, or other process of a court or willful breach of an undertaking given to a court constitutes contempt of court”.
33. Section 10(7) provides as follows;
- “A person may appeal against an order of the Court made by way of punishment for contempt of court as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the Court.”
34. It is undisputed that the contempt conviction herein arises from the determination of the magistrate's court which was sitting as a court gazetted to determine environment and land matters pursuant to Section 26 (3) and (4) of the [Environment and Land Court Act](#), and Section 9 (a) of the [Magistrates' Courts Act](#).
35. Section 26(4) of the [Environment and Land Court Act](#) provides;
- “Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court.”
36. In view of the foregoing, it is clear that any Appeal from the Magistrates Court hearing environment and land matters ordinarily lies with this court. Taking into account the foregoing and in light of the Respondents' arguments, can it be said that contempt proceedings originating from the Magistrates Court are criminal in nature and Appeals therefrom lies only with the criminal court?
37. While conceding that the Environment and Land Court has no jurisdiction to entertain Criminal Appeals, the court opines that contempt proceedings are not strictly speaking criminal in nature. They are quasi criminal and sui generis. Where contempt proceedings arise from a civil claim, they remain civil proceedings that invoke criminal sanctions.
38. As already stated above, contempt proceedings are quasi criminal in nature and have the underlying concept of upholding the rule of law and maintaining the dignity of the court and as such, each court, whether exercising criminal or civil jurisdiction is empowered to punish for contempt of its orders.
39. Contempt power is something regarded as intrinsic to the notion of court. In the common law lawyer's eye, the power of contempt is inherent in courts, and automatically exists by its very nature. Indeed, this court is vested with the original jurisdiction to punish for contempt pursuant to Section 29 of the [Environment and Land Court Act](#) as well as Section 5 of the [Judicature Act](#).
40. A literal interpretation of Section 10 (7) of the [Magistrates' Courts Act](#) implies that notwithstanding the fact that Appeals from the Magistrates' Court may lie to the Environment and Land Court, such as in the present circumstances, where an Appeal arises from contempt proceedings, the same constitute distinct proceedings whose Appeal lies either in the High Court or the two courts with the status of the High Court as the case may be.
41. Noting that contempt does not occur in vacuum, practically, separating contempt proceedings from the parent suit will result in a situation where the High Court will not be able to venture one inch outside the contempt application even where the Appeal so requires.



42. Further, having already noted that this court despite not being a criminal court is equally vested with the powers of contempt, a purposive interpretation would go against the contention that it loses this power at the Appellate stage.
43. As expressed by Mulenga, JSC in *Habre International Co. Ltd vs Kassam and Others* [1999] 1 EA 125;
- “The tendency to interpret the law in a manner that would divest courts of law of jurisdiction too readily unless the legal provision in question is straightforward and clear is to be discouraged since it would be better to err in favour of upholding jurisdiction than to turn a litigant away from the seat of justice without being heard; the jurisdiction of courts of law must be guarded jealously and should not be dispensed with too lightly and the interests of justice and the rule of law demand this.”
44. In view of the foregoing, the court is not convinced that it lacks jurisdiction to entertain this Appeal. Consequently, the Preliminary Objection dated 17th November, 2021 is unmerited and the same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF JUNE, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mutegi for the Appellant

M. Ataka for the 1st Respondent

Ms. Wnagui for the 3rd Respondent

Court Assistant - Nechesah

