Matilda & Muli t/a Espermatj Enterprises v Equity Bank Kenya Limited & another (Commercial Civil Case E016 of 2024) [2025] KEHC 5377 (KLR) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5377 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

COMMERCIAL CIVIL CASE E016 OF 2024

EN MAINA, J

APRIL 24, 2025

BETWEEN

MOSES MULI MATILDA & MATILDA N MULI T/A ESPERMATJ ENTERPRISES .... PLAINTIFF

AND

EQUITY BANK KENYA LIMITED .... 1ST DEFENDANT

LIBERTY LIFE ASSURANCE (K) LIMITED .... 2ND DEFENDANT

RULING

1. This is a Ruling on the 2nd Defendant's preliminary objection dated 16th December, 2025 which seeks to have the declaratory suit filed herein by the Plaintiffs dismissed for want of jurisdiction by this court to entertain it.

2. Briefly, the background of this case is that sometimes in the year 2023 the Plaintiff obtained a loan from the 1st Defendant to develop his property L.R. Athi River/Athi River Block1/1967. The first loan could not complete the construction he was undertaking on the property and so he approached the 1st Defendant for a second loan facility which was granted. Upon granting him each of the loans the Defendant appointed the 2nd Defendant to insure the same allegedly against death, permanent and total disability and critical illness. It is the Plaintiff's case that in the course of the insurance period he became chronically ill due to kidney disease and suffered from a disability which prevented him from repaying the loan. He therefore filled a Claim Form and the 2nd Defendant duly settled the first loan but refused to settle the second one on the ground that the claim was not within the requisite six (6) months waiting period. This despite that he had paid the premium.

3. Following the 2nd Defendant's refusal, he lodged an appeal with the Insurance Regulatory Authority which was however dismissed. It was then that the 1st Defendant issued him with a Statutory Notice of sale intending to foreclose so as to recover its loan and hence this suit.

4. It is however the 2nd Defendant's case that this court has no jurisdiction to entertain the plaintiff's claim as the Plaintiff having lodged a complaint with the Commissioner of Insurance and lost his recourse was to file an Appeal with the Insurance Appeals Tribunal as provided under Section 173 and 204 A of the *Insurance Act*.

5. The Plaintiff has urged this court to overrule the preliminary objection. It is his contention that jurisdiction to hear the suit lies with this court but not the Insurance Appeals Tribunal because what he seeks touches on charges and breach of mortgage which the Appeals Tribunal has no power to entertain. He also contends that the issue raised by the 2nd Defendant is not a preliminary objection as envisaged in the case of *Mukisa Biscuits Manufacturing limited -v- West End Distributors* [1969] EA 696 and as reiterated by the Supreme Court in the case of *Hassan Ali Joho & Another -v- Suleiman Said Shabal & 2 others* SCK Petition No.10 of 2013 [2014] eKLR and also in the case of *Hassan Njanje Charo -v- Khatib Mwashetani & 3 Others* [2014} eKLR.

6. In his submissions Learned Counsel of the Plaintiff argued that Section 173 of the *Insurance Act* does not adequately cover the issues raised in the Plaint and that a matter of fact the Insurance Regulatory Authority only confined itself to the issue of the waiting period and settled it fully. That however the issues of the Statutory Notices and obligations arising under the loan facilities were not determined by the Insurance Regulatory Authority. Learned Counsel for the Plaintiff argued that the High Court has decided similar cases and gave the examples of HCC No. 217 of 2017 *Emray Enterprises limited -vs- National Bank of Kenya* and the case of *Anne N. Parmena -vs- Housing Finance Company* (citation not supplied). Counsel submitted in these two cases the Judge determined issues of outstanding sums from pending banks and insurable interests attached to the said sums. Counsel therefore urged this court to overrule the preliminary objection and proceed to hear the case as it is in any event, seized with unlimited original jurisdiction to hear civil cases as this case. Counsel also argues that Section 173 (1) of the *Insurance Act* is not mandatory as the word used is may but not shall; that this court is also being invited to consider the semantics of the ream aggrieved so as to determine whether or not it has jurisdiction to hear the case. Counsel contended that the court would have to consider whether the Plaintiff was aggrieved by the waiting period or with the statutory notices and subsequent compulsion to pay the outstanding loans; that the issue of being aggrieved then becomes an issue of fact which would not constitute a proper point of preliminary objection.

7. Counsel for the Plaintiff urged this court to be guided by the case of *Embassy of the Kingdom of Belgium in Nairobi -vs- Charles Gitau Mande* [2025] eKLR where the Court of Appeal held that where the court is not seized of sufficient information as to make a proper inference and decision on jurisdiction then it is advisable to postpone the decision till all parties have ventilated their cases.

Analysis and determination

8. I have considered the preliminary objection, the pleadings, the rival submissions, the cases cited and the law. It is indeed correct that this court has unlimited original jurisdiction to hear and determine civil cases as provided in Article 165 of the *Constitution*. It is also not lost to this court that a preliminary objection is one that raises a pure point of law and which once argued may dispose of the suit.

9. It has also been held that the question of jurisdiction is paramount as once raised it must be determined because should a court find that it has no jurisdiction then it must down its tools – see the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd.* [1989] eKLR.

10. In the case of *Mukisa biscuits Manufacturing limited -v- West End Distributors* [1969] EA 696, 700 J.A. stated;

> " [D] ......so far as I am 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. 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 ...."

11. Similarly, in the case of *United Millers Limited v Kenya Bureau of Standards & 5 others* (Petition (Application) 4 of 2021) [2021] KESC 72 (KLR) (Civ) (16 July 2021) (Ruling) the court held;

> " [1] Where any party to proceedings raised an objection as concerned the court's jurisdiction, the objection had to be dealt with as a preliminary issue before the meritorious determination of the cause. The court had to consider whether the application met the set jurisdictional principles under article 163(4)(a) of the *Constitution*."

12. Guided by the above decisions it is imperative that this court first determines the issue of jurisdiction before taking another step in this case.

13. The preliminary objection raised in this case is not so much as that this court has no power to hear this claim. In my understanding it is one based on the doctrine of exhaustion which is to the effect that where the law provides for another dispute resolution mechanism then the parties must exhaust that mechanism before approaching the court. See the Court of Appeal *Nyaoga v Chairman Kisii County Assembly & 3 others* (Civil Appeal E034 of 2023) [2023] KECA 1540 (KLR) (8 December 2023) (Judgment) where the court held;

> " (33) From this, it is clear to us that the appellant has not exhausted the available remedies as the original charges have been varied and the appellant has been invited to respond to said charges. Indeed, we echo what was pointed out by the trial court that section 9 of the said regulations provides that the commission may hear appeals against any decision regarding the engagement of any person in a county government including inter alia, disciplinary control such as dismissal and imposition of any other administrative punishment. These regulations have a settling effect on the question as to whether the appellate processes set out in Section 77 of the County Government Act is applicable to both staff employed by the County Public Service Board and the County Assembly Service Board. We do not detect any error in application of the law, or in application of legal principles on the part of the trial Judge. We thus find that the trial Judge was not at fault in finding that the court lacked jurisdiction for want of the appellant exhausting all available remedies before directly invoking the court's jurisdiction."

14. In paragraph 25 of the plaint the plaintiff avers that following the refusal of the 2nd Defendant to pay off the second loan due to his illness, he filed a complaint with the Commissioner of Insurance. This he was entitled to do under Section 204 A (1) of the *Insurance Act* which states:

> " [204 A] Power of the Authority to settle disputes

(1) Any insurance customer may lodge a written complaint with the Commissioner against a regulated entity in relation to the provision of its services."

15. This suit is a clear testament that the Plaintiff was dissatisfied with the Commissioner's decision on the issue of whether the 2nd Defendant was under a duty to pay off the loan due to the 1st Defendant. Where a party has voluntarily elected to pursue his complaint under an alternative dispute mechanism and there is a statutory appellate method prescribed then he is bound to exhaust that system before coming to court.

16. However, the Supreme Court has held that even then, when such a party approaches the court, it must consider the suitability of that statutory appellate mechanism in the context of the particular case. This was the court's holding in the case of *NGOs Co-ordination Board -vs- EG & 4 Others; Katiba Institute (Amicus Curiae)* Petition 16 of 2019 [2023] KESC 17(KLR) (Constitutional and Human Rights) 24th February 2023) (Judgment) (with dissent – MK Ibrahim & W. Ouko, SCJJ) where it stated:

> "[4] Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it was only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, the court needed to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it."

15. I also find guidance in the Supreme Court Case of *Nicholas -v- Attorney General & 7 Others; National Environment complaints committee & 5 Others (interested Parties)* Petition E007 of 2023 [2023] KESC 113 (KLR) (28th December, 2023) (Judgment) where similarly the court held:

> "[6] Where there was an alternative remedy, especially where Parliament had provided a statutory appeal procedure, then it was only in exceptional circumstances that the court could resort to any other process known to law..........
>
> [11] .....Section 9(2) of the *Fair Administrative Action Act*, provided that where there existed internal mechanisms for the resolution of a dispute, the court would not review the administrative action until the internal dispute mechanism had been exhausted. That fact notwithstanding, there was nothing that precluded the adoption of a nuanced approach, that safeguarded a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms could offer. That was also why section 9(4) of the *Fair Administrative Action Act* created the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party."

15. In this case the Plaintiff has raised the issue of the Statutory Notice issued upon himself by the 1st Defendant, for defaulting and that is not an issue within the jurisdiction of either the Commissioner of Insurance or the Tribunal established under the *Insurance Act*. It is my finding therefore that the statutory appellate mechanism provided for under Section 204 A (3) of the *Insurance Act* may not

suffice to resolve the dispute in the context of the case and that it is proper therefore to adopt a nuanced approach so as to safeguard the Plaintiff's right to access justice.

16. In the premises, the preliminary objection is overruled. The costs thereof shall be in the cause.

Orders accordingly.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 24TH DAY OF APRIL, 2025.

E. N. MAINA

JUDGE

In the Presence of:

Ms Kamene for the Plaintiff

Ms Lelu for Muhuri for the 2nd Defendant

Ms Ngure for 1st Defendant

C/A: Geoffrey