



**Fahari Wholesalers & Retailers Pharmacy Limited v Henry Kidula & another
(Civil Appeal 48 of 2017) [2024] KEHC 3953 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3953 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 48 OF 2017
SC CHIRCHIR, J
APRIL 18, 2024**

BETWEEN

FAHARI WHOLESALERS & RETAILERS PHARMACY LIMITED .. APPELLANT

AND

HENRY KIDULA 1ST RESPONDENT

J.O JOSIAH T/A NYALUOYO AUCTIONEERS 2ND RESPONDENT

*(Being an appeal from the orders of Hon. J Ong'ondo PM in
Kakamega CMCC E92 OF 2017 on the 18th April 2017)*

JUDGMENT

1. On 6th March 2017 Appellant filed suit at the chief Magistrate's court, against the Respondents herein seeking for an injunction to stop the 2nd Respondent from attaching the Appellant goods on account of unpaid Rent. It also sought for a declaration that the intended attachment was unlawful and finally general damages for unlawful attachment.
2. The Appellant at the same time filed a Notice of motion seeking for an injunction against the attachment, pending the hearing of the suit. The Application was heard and dismissed by the trial court.
3. The Appellant was dissatisfied with the dismissal of the Application and filed the present Appeal , setting out the following grounds;
 - a. That the learned trial magistrate erred in law and in fact in failing to find that the appellant was not the tenant of the respondents and hence no distress of rent could issue against its property.-nexus btw levy distress against



- b. That the learned trial magistrate erred in law and in fact in failing to fully appreciate the imports of section 138 of the companies Act
 - c. That the learned trial magistrate erred in Law and in Fact in failing to appreciate the case that was before him hence arriving at a wrong decision
 - d. That the learned trial magistrate erred in Law and in Fact in failing to appreciate that the appellant was a body corporate and separate entity from the respondent's tenant.
 - e. That the learned trial magistrate erred in law and fact in considering extraneous matters in arriving at his decision.
4. This being a first Appeal , this court is under the duty to review the evidence presented, re- evaluate it and arrive at its own conclusion as was stated in the case of *Selle & Ano vs Associated Motor Boat Co Ltd & others (1958) E.A 424.*

The question of Jurisdiction

- 5. The issue of jurisdiction has not been raised by either of the parties. But it is trite law that a court cannot arrogate itself jurisdiction. Jurisdiction only emanate from the constitution or statute or both. Consequently, notwithstanding that the issue has not been raised by either parties this court is duty-bound to consider whether it has jurisdiction to entertain this Appeal.
- 6. From the pleadings in the trial court, it emerges that the subject matter of the suit was a rent dispute, arising out of the occupation of land parcel No. Kakamega Block 1/68 . The occupation by the Appellant was pursuant to a lease agreement signed between the parties. I notice that the question of who signed the lease, and hence who was the actual tenant is in dispute, but that question has no relevance to the question of whether this court has jurisdiction to determine the said issues.
- 7. The pertinent question then is whether the high court has jurisdiction to entertain this Appeal.
- 8. The jurisdiction of the High court is set out under Article 165(3) and (4) of the constitution .
- 9. Under Article 165(5) the high court is expressly barred from entertaining matters reserved for courts established under Article 162 (2). Article 165(5) states as follows: “The High court shall not have jurisdiction in respect to matters:-
 - a). reserved for the exclusive jurisdiction of the supreme court under this constitution.
 - b). falling within the jurisdiction of the courts contemplated in Article 162(2)”
- 10. Courts contemplated under Article 162(2) are (a) the Employment and labour relations court and (b) The Environment and the use and occupation of land. Article 162(3) mandated parliament to enact a law determining the jurisdiction and functions of the court contemplated under in Article 162(2)
- 11. To operationalize Article 162(2), parliament enacted the Environment and Land court with the mandate to determine disputes relating to use and occupation of land. The jurisdiction of the court is set out under section 13 of the Environment and Land Court.
- 12. Under section 13(2) (a): the court is to hear and determine disputes relating to environment planning and protection, climate issues , land use planning , tenure, boundaries, rates, rent, valuation, mining minerals and other natural resources
 - b).....



- c).....
- d) relating to public, private and community land and contracts, choices in action or other instruments granting any enforceable interest in land
- e).....
13. section 13(4) provides: “In addition to the matters referred to in subsection 1 and sub- section 2 the court shall exercise appellate jurisdiction over decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court”.
14. Section 13(7) of the same Act states: In exercise of its jurisdiction under this Act , the court shall have power to make any order and grant any relief as the court deems fit and just including :
- a). interim or permanent preservation orders including injunctions
- b).....
- c) award of damages
- d) compensation
- e) specific performance
- f).....
- g). Declarations
- h). costs.
15. . In the present case the Appellant is seeking to stop distress of rent, a declaration that the said distress was illegal and damages for illegal distress. The dispute on rent arises out of a tenancy agreement between the parties. The dispute clearly relates to choses in action or other instruments granting enforceable interest in land . Tenancies or leases are covered by both the [Land Registration Act](#) , No.3 of 2012 and [Land Act](#) No. 6 of 2012. The mandate of the Environment and Land court to enforce the provisions of these two statutes are found in section 101 of the [Land Registration Act](#) and section 150 of the [land Act](#)
15. The claim herein as stated before is for distress for rent . Admittedly the right to levy distress will be on goods , not land . However the right to levy distress arises from a tenancy agreement, whether such an agreement was reduced into writing or not. The proper court therefore to interrogate whether the right to levy distress was in line with the tenancy agreement is the Environment and land court
16. All the remedies that the Appellant is seeking , that is injunction, declaration and damages can be enforced by the Environment and Land court pursuant to section 13(7)as aforesaid
17. Where the matter is an Appeal from the lower court as it is in this case, then pursuant to section 13(4) of the Environment and Land court , the court bestowed with jurisdiction is still the Environment court and Land court.
18. In conclusion , it is my finding that this Appeal was filed in the wrong court. This court has no jurisdiction to entertain it
19. The same is hereby struck off, with no orders as to costs.



**DATED, SIGNED AND DELIVERED AT NAIROBI VIA THE MICROSOFT TEAMS THIS 18TH
DAY OF APRIL 2024.**

S. CHIRCHIR

JUDGE

In the presence of :

Godwin – Court Assistant

