Leo Investments Limited v Mohammed (Commercial Case E067 of 2023) [2024] KEHC 4601 (KLR) (Commercial and Tax) (9 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4601 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E067 OF 2023

AA VISRAM, J

APRIL 9, 2024

BETWEEN

LEO INVESTMENTS LIMITED ..... PLAINTIFF

AND

FEISAL SHARIFF MOHAMMED ..... DEFENDANT

RULING

1. I have considered the Notice of Preliminary Objection dated 15th August, 2023; the submissions in support and in opposition to the same; and the applicable law.

2. The basis of the objection is that this court has no jurisdiction to deal with the present matter as the same relates to the occupation and title of land, and therefore, falls under the specialized courts pursuant to Article 162 of *the Constitution*; Section 13 of the *Land Act*; and Section 57 of the *Land Act*.

3. The Applicant further submitted that there are no agreements in writing between the parties; and the tenant is presently paying rent without a contract in place. The situation as described, has accordingly created a periodic tenancy, which he submitted falls within the mandate of the Environment and Land Court pursuant to above stated sections of the *Land Act*.

4. Counsel referred to various letters containing the agreement between the parties, and submitted that the same were not properly authorized, giving rise to his contention; finally, he submitted that the Plaintiff was attempting to enforce an invalid letter of offer, which this court ought to reject.

5. In opposition to the Preliminary Objection, the Respondent relied on the authority of *Rameshchandra Somachad Shah & Another vs. Palm Healthcare International Limited (in receivership) & 3 Others*, Civil Suit No. 448 of 2012 (2019) eKLR, and submitted that in the said matter, the Plaintiff brought a suit to the High Court in Commercial and Tax Division, through a Plaint, dated 5th July, 2012, seeking

for Kshs.30,638,242.00/=, interests thereon at the market rate from the date hereof until payment in full, and costs of the suit. The above matter is a parallel comparison to this instant suit where the claim is for specific amounts arising from unpaid rent.

6. In the said authority, at paragraph 26 of the ruling, I note that the court stated:-

> "I find that a claim for rent is not a claim for use or occupation of land for which the Environment and Land Court would have jurisdiction. In other words, I find that the Plaintiffs claim for rent and mesne profits could not be by any stretch of imagination be a claim for use or occupation of land".

7. I note that this was also upheld in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others*, Civil Appeal No. 83 of 2016 [2017] eKLR, where the Court of Appeal at Mombasa held at paragraph 41 of its judgment, that contracts incidental to the "use" of land do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court." The court went on to state that:- "by parity of reasoning, the dominant issue in this case was the settlement of amounts owing from the Respondents to the appellants on account of a contractual relationship".

8. Finally, I cannot help but notice that the Applicant's own authority cited in support of the Preliminary Objection, namely Civil Case No.5 of 2009 (published in 2021) is a decision by the High Court in respect of rent arrears owing to and awarded to the Plaintiff.

9. The bone of contention is however, whether or not a contract exists between the parties in the present matter. This however is a question of fact, and not a point of law.

10. An objection on the ground of jurisdiction is ordinarily a pure point of law subject to the test in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696, where the court held as follows:-

> "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 the 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. Based on the submission before me, I am not satisfied that the test above has been met. I say so, because the Applicant's contention relates to questions of fact. In particular, questions have been raised relating to the validity of the parties' letter of offer; and whether or not there is a contract in place between the parties, giving rise to a periodic tenancy. I am satisfied that in order to ascertain the same, this court would be required to interrogate the evidence and arrive at findings of fact in respect of the said allegations. This is not the purpose of a Preliminary Objection, and the court ought not to undertake such a task as this stage.

12. On the above point, I reiterate that based on the test set out in *Mukisa Biscuits* (supra) a Preliminary Objection must first, raise a point of law based on ascertained facts and not on evidence:-

> "In the words of Sir Charles Newbold P, at page 701,
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> ...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." (emphasis mine)

13. To my mind, the above threshold has not been met. Based on the reasons above, I find that the Respondent's Preliminary Objection of 15th August, 2023, is without merit and is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 9TH DAY OF APRIL 2024.

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

..... For the Plaintiff

..... For the Defendant