



**Murage v Lesedi Developers Limited (Civil Appeal 196 of 2023)
[2024] KEHC 8882 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8882 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL 196 OF 2023
MA OTIENO, J
JULY 19, 2024**

BETWEEN

EUNICE NYAMBURA MURAGE APPELLANT

AND

LESEDI DEVELOPERS LIMITED RESPONDENT

*(Being an appeal from the Ruling of Honourable O.J. MUTHONI, RM)
delivered at Thika on 14th April 2023 in Thika SCCC No. E196 of 2023)*

JUDGMENT

Introduction

1. This appeal emanates from the Ruling delivered on 14th April 2023 in Thika Small Claims Court (SCC) No. E196 of 2023. In the Ruling, the trial court upheld the Respondent's Preliminary Objection on the issue of jurisdiction of the court to handle a dispute which had been commenced by the Appellant against the Respondent.
2. The brief facts of the Claim at the trial court are that on 14th February 2022, the Appellant paid to the Respondent a sum of Kshs. 799,000/- towards the purchase of a plot that was to be hived off Title No. Thika/Gatwanyaga/3209. That a sale agreement in that regard was executed between the parties on 22nd February 2022. The deal went south and the Respondent for some reason failed to transfer the subject land.
3. Following the failure by the Respondent to transfer the land to the Appellant, the Appellant sought to have the money refunded. On 16th February 2023 the Appellant filed the claim at SCC, Thika, against the Respondent for refund of the monies.
4. Following the filing of the suit, the Respondent on 1st March 2023 filed a Preliminary Objection, disputing the jurisdiction of the court on the basis that Clause 19 of the sale agreement executed



between the parties provided that in the event of a dispute between the parties, the dispute was first to be referred for mediation.

5. The trial court after hearing from both parties, delivered its Ruling on 14th April 2023 and agreed with the Respondent's position that the court did not have jurisdiction in view of wordings of clause 19 of the sale agreement which was mandatory in nature.
6. Aggrieved by the trial court's Ruling, the Appellant filed this appeal, raising five grounds of appeal in her Memorandum of Appeal to this Court, key among them being that the trial court erred in law by finding that the court lacked jurisdiction to hear and determine the dispute.

Submissions

7. The appeal was canvassed by way of written submissions. The Appellant's submissions was filed on 17th May 2024 whilst that of the Respondent is dated 6th June 2024.
8. Having perused the grounds of appeal as enumerated in the memorandum of appeal, I note that the Appellant's major complain against the ruling by the trial court are two-fold, first, that the trial court erred by finding that the objection raised by the Respondent met the threshold set in *Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* 1969 E.A. 696. The second major ground of appeal against the ruling is that the trial court erred by holding that it did not have jurisdiction to hear and determine the dispute between the Appellant and the Respondent.
9. The other ground raised by the Appellant in the appeal is that the trial court in reaching its decision, failed to appreciate the issues raised in the claim, including the fact that the Respondent has since December 2022 promised to refund to her the money, but to no avail.
10. The Respondent on the other hand submitted that its Preliminary Objection dated 27th February, 2023 before the trial court was in accordance with the law. Citing *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, the Respondent asserted its Preliminary Objection met the parameters and definition of a Preliminary Objection and as such the Hon. Adjudicator did not err in any way allowing the application.
11. According to the Respondent, Clause 19 of the Agreement signed between the parties in relation to the matter in question provided for alternative dispute resolution before proceeding to the Courts. Consequently, the trial court was right in its findings that it did not have jurisdiction since the dispute resolution mechanism as provided in the agreement between the parties had not been exhausted.
12. Based on the above, the Respondent urged this court to dismiss the appeal with costs to the Respondent.

Analysis and determination

13. This is an appeal emanating from the Small Claims Court pursuant to section 38 of the [Small Claims Court Act](#) which provides as follows; -
 - “(1) A person aggrieved by the decision or an order of the Court may appeal against that decision or order to the High Court on matters of law.
 - (2) An appeal from any decision or order referred to in subsection (1) shall be final.”
14. It therefore follows that in appeals originating from the Small Claims Court to this court, the court can only entertain appeals limited to points of law in terms of Section 38(1) of the [Small Claims Act](#). It



therefore follows that the trial court's findings on the question of fact are to be accepted by this court unless it is demonstrated to this court that the trial court's conclusions on those facts are so perverse, to warrant the attention of this court, exercising its appellate jurisdiction under the law.

15. The duty of this court when dealing with appeals from the Small Claims Court under Section 38 of the Act is equivalent to that of the Court of Appeal when dealing with a matter on a second appeal. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR the Court of Appeal distinguished between matters of law and matters of fact as follows: -

“First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see *Selle and Another vs. Associated Motor Boat Company Ltd and Others* (1968) EA 123. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

16. Again, in *Charles Kipkoech Leting v Express (K) Ltd & another* [2018] eKLR the Court of Appeal further clarified that where a right of appeal is confined to questions of law only, an appellate court is duty bound to accept the findings of fact by the lower court. That it should not interfere with the findings of the trial on the factual issues unless it is apparent that, based on the evidence on record, no reasonable tribunal or court could have reached the same conclusion, in which case, the holding or decision would be bad in law and therefore qualify to be reviewed on a second appeal. The court stated that; -

“This is a second appeal. Our mandate is as has been enunciated in a long line of cases decided by the Court. See *Maina versus Mugiria* [1983] KLR 78, *Kenya Breweries Ltd versus Godfrey Odongo*, Civil Appeal No. 127 of 2007, and *Stanley N. Muriithi & Another versus Bernard Munene Ithiga* [2016] eKLR, for the holdings inter alia that, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the Courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See also the English case of *Martin versus Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held inter alia that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.”

17. I have considered the rival submissions by the parties, the evidence on record and the authorities cited by both Counsel. The instant appeal is solely on the issue of jurisdiction of the trial court. In *Muvokanza Limited v Muri Mwaniki Thige & Kageni Llp & another* (Environment & Land Case 120 of 2021) [2022] KEELC 2275 (KLR) (16 May 2022) the court stated following on the question of jurisdiction; -

“8. In the instant suit the 1st and 2nd defendant has based his Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the Plaintiff's suit. The issue of jurisdiction is a pure point of law which can



determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff's case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools..."

18. From the above, it is evident that the question of jurisdiction, as raised in the instant appeal, is clearly a question of law and therefore falls within the ambit of section 38 (1) of the *Small Claims Court Act*. Consequently, this court has jurisdiction to entertain this appeal.
 19. Having found that this court has jurisdiction over the matter under section 38(1) of the Small Claims Act, I will now proceed and examine the substance of the objection with a view of establishing whether or not the trial court was right in its Ruling.
 20. Section 12 of the *Small Claims Court Act*, Act prescribes the jurisdiction of the Small Claims Court. The Section provides that subject to the Act, the Rules and any other law, the court is to deal will any civil claim relating to the following; -
 - a. a contract for sale and supply of goods or services;
 - b. a contract relating to money held and received;
 - c. liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - d. compensation for personal injuries; and
 - e. set-off and counterclaim under any contract
- [Emphasis added]
21. The pecuniary jurisdiction of the court is limited to one million shillings under Section 12(3). Section 13 of the Act is the exclusion clause on jurisdiction and specifies disputes which falls outside the jurisdiction of the Small Claims Court.
 22. According to the Appellant's Statement of Claim dated 14th February 2023, the claim is expressed to be for 'a contract relating to money held and received', which obviously falls under section 12(1)(b) of the *Small Claims Court Act*. A perusal of the pleadings as well as the documents attached in support of the claim confirms that position. Consequently, I find that the claim as presented by the Appellant before the trial court, was well within the jurisdiction of the court.
 23. The next issue I will be looking at in this judgment is whether clause 19 of the Agreement dated 22nd February, 2022 between the Appellant and the Respondent ousted the jurisdiction of the court.
 24. A perusal of the ruling by the trial court reveals that the court in its ruling accepted the Respondent's argument that clause 19 of the Agreement dated 22nd February, 2022 between them required the parties to first submit the matter to mediation before proceeding to court.
 25. The trial court in its ruling of 14th April 2023 in stated as follows;

"I further note that Clause 19 clearly indicates that any disputes arising from the agreement shall be referred to an accredited mediator within fourteen (14) days. The words "shall" is



used meaning that this court has no jurisdiction to hear and determine this dispute and so I find”

26. The subject clause 19 of the Agreement dated 22nd February, 2022 between the Appellant and the Respondent provided as follows;

“19. Should any dispute arise between the Parties hereto with regard to interpretation, rights, obligations and/or implementation of any one or more of the provisions of this Agreement, the Parties shall in the first instance attempt to resolve such dispute by amicable negotiation. Should such negotiations fail to achieve a resolution within fifteen (15) days of notification (in writing) of the dispute to the other Party, either Party may declare a dispute by written notification to the other, where upon such dispute shall be referred to Mediation under the following terms: -

- I. The Parties shall appoint a single Accredited Mediator by Agreement within fourteen (14) days thereof. If no such agreement is reached between the parties, either party may in writing request for an accredited Mediator from Mediation Committee;
- II. Such Mediation shall be conducted in Nairobi in accordance with the Mediation Rules, 2015 or the law for the time being in force;
- III. To the extent permissible by Law, the determination of the Mediator shall be conclusive and binding upon the Parties hereto with the option for an aggrieved Party appealing to a Court of competent jurisdiction.
- IV. Notwithstanding the above provisions of this Clause, either Party being aggrieved is entitled to seek preliminary or interim injunctive relief or conservatory measures from any Court of competent jurisdiction pending outcome of the Mediation.”

27. What is clear for the above clause is that any dispute between the parties under the agreement was first to be resolved amicably through negotiations and that where such negotiations fail to achieve a resolution within 15 days, then the dispute was to be referred to mediation upon notification of the dispute by a party to the other. It is also clear from the agreement that parties agreed on the mode of appointment of a mediator, place of mediation and rules to govern any mediation between the them.

28. The question which must then be asked is whether that clause, on its own, ousted the jurisdiction of the trial court to deal with the dispute notwithstanding the fact that the claim was one of ‘a contract relating to money held and received’, falling within section 12(1)(b) of the [Small Claims Court Act](#).

29. It is trite that jurisdiction is conferred on courts, either by the [Constitution](#) or statute or both. See the Supreme Court decision in [Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others](#) (2012) eKLR where the court 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 ...”

30. It is also trite law that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or the Act of Parliament, then that procedure should be followed. See the holding in the case of Speaker of the National Assembly v Karume [2008] 1 KLR 425 where the court affirmed this position.
31. From the above, it is evident that it is only the Constitution or a Statute that can confer or oust jurisdiction the jurisdiction of a court. It therefore follows that an agreement between parties cannot on its own, confer or oust jurisdiction of a court, unless it is first backed by a statute.
32. Even in disputes emanating from agreements with arbitration clauses under the Arbitration Act, what courts are expected to do under section 6 of the Act, is to stay the proceedings and refer the same for arbitration. Again, such stay can only be made where it is demonstrated that strictures under section 6 of the Act are met. The court cannot fold its hands and dismiss the claim for want of jurisdiction. See Rawal v The Mombasa Hardware Ltd [1968] E.A. 398 where the court held that an arbitration clause in an agreement does not limit or oust the jurisdiction of the court to grant the reliefs sought by way of Plaintiff.
33. The decision in the Rawal case (*supra*) was applied by the court in Peter Muema Kahoro & Another v Benson Maina Githethuki, [2006] HCCC(Nairobi) No. 1295 of 2005 where the plaintiff had sued the defendant seeking to enforce an agreement for sale of land. The Defendant then brought an application seeking to strike out the Plaintiff’s suit on the ground that the court did not have jurisdiction to try the matter. The Defendant argued that the Plaintiff had failed to comply with the arbitration clause in the agreement. The court dismissed the Defendant’s application, holding that striking out of a suit was beyond the ambit of Section 6 of the Arbitration Act.
34. In the circumstances of this case, I hold the view that the mediation clause 19 in the agreement dated 22nd February 2022 between the Appellant and the Respondent could not in law oust the jurisdiction of the trial court conferred by Section 12 of the Small Claims Court Act.
35. In the premises, find and hold that the trial court had jurisdiction to deal with the dispute and it was therefore an error of law on the part of the Hon. Adjudicator to hold otherwise. If for any reason the court was satisfied that there was real dispute warranting mediation, then what the court ought to have done is to refer the matter for mediation while retaining jurisdiction over the matter.
36. It should however be remembered that not all suits with agreements incorporating arbitration or mediation clauses are to be automatically stayed and referred for arbitration. A trial court must first be satisfied that there is real dispute warranting referral of the matter for arbitration or mediation.
37. In HCCOMM No. E897 of 2021 AECOM South Africa Holdings (Pty) Ltd v Kenya National Highways Authority, the court dismissed an application by the defendant for orders of stay and referral of the dispute to arbitration on the basis that there was no dispute between the parties that warranted referral to arbitration. The court noted that while Plaintiff had presented invoices and demand letters showing that the Defendant was indebted to it, on its part, the defendant did not present any correspondence or evidence demonstrating that it disputed the Plaintiff’s claim.
38. Looking at the Record of Appeal in the instant appeal, I note that the Respondent has not filed any response to the claim and has therefore not provided any evidence or correspondence disputing



the Appellant's claim for the refund of Kshs. 799,000/-. However, having found that the trial court has jurisdiction over this matter, I will leave it to the trial court to determine, based on the evidence available, whether there is really any dispute in this matter that warrants referral to mediation.

Disposition

39. For the reasons set out above, the appeal herein succeeds. Consequently, I make the following orders; -
- i. The trial court's Ruling of 14th April 2023 allowing the Respondent's Notice of Preliminary Objection dated 27th February 2023 is hereby set aside and substituted with an order of this court dismissing the Respondent's Notice of Preliminary Objection dated 27th February 2023.
 - ii. The matter is hereby remitted back to the trial Court for trial and conclusion.
 - iii. The Respondent shall bear the cost of this appeal.
40. It so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

Moses – Court Assistant

Mr. Njenga.....for the Appellant.

Ms. Ndichu h/b for Mwendwa.....for the Respondent.

