



**Ruby Interiors Limited v Murang’a Estate Agent Limited (Civil Appeal E528 of 2022) [2024] KEHC 10929 (KLR) (Civ) (9 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 10929 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E528 OF 2022**

**AC BETT, J  
SEPTEMBER 9, 2024**

**BETWEEN**

**RUBY INTERIORS LIMITED ..... APPELLANT**

**AND**

**MURANG’A ESTATE AGENT LIMITED ..... RESPONDENT**

*(Being an appeal from the Judgement and Decree of the Honourable Kagoni E.M. (PM) delivered on 17th June 2022 in the Chief Magistrate’s Court at Nairobi MCOMMSU No. E790 of 2020)*

**JUDGMENT**

1. By the letter of offer dated 5<sup>th</sup> August 2019, the respondent offered the appellant a leasehold over business premises on the basement of the building known as Mageso Chambers for a period of six years subject to a lease that was to be executed within 14 days. Immediately upon accepting the offer on the same day, the appellant indicated that it made the following payments as stipulated in the letter: -
  - a. Goodwill of kshs.300,000/=
  - b. Two months’ rent deposit of kshs.170,000/=
  - c. One month’s rent of kshs.85,000/=
  - d. Legal fees for preparation of lease kshs.50,000/=.
2. The appellant also claimed that it settled an outstanding electricity bill of kshs.16,000/= bringing the entire sum to kshs.621,000/=.
3. It was the appellant’s case that they could not take possession of the premises because it was not vacant, and it was inhabitable due to flooding as a result of a leaking roof. The appellant’s claim was for a



- refund of the money had and received by the respondent who had failed, despite several promises to make good the premises thereby rendering the lease agreement between the parties untenable.
4. The appellant claims that the Respondent failed to fulfil promises to refund it thereby necessitating the suit.
  5. Upon hearing the parties, the learned trial magistrate dismissed the appellant's suit with costs.
  6. Aggrieved with the decision of the trial magistrate, the appellant filed a Memorandum of Appeal dated 14<sup>th</sup> July 2022 raising the following grounds of appeal: -
    - i. That the learned magistrate finding that the suit premises were in suitable condition is not supported by the facts and the evidence on record.
    - ii. The learned magistrate erred in law and fact in finding that the Plaintiff had vacant possession of the suit's premises.
    - iii. The learned magistrate erred in law and fact in finding that the Plaintiff is not entitled to a refund of the deposit amount and rent of kshs.255,000/=.
    - iv. The learned magistrate erred in finding that the Plaintiff is not entitled to a refund of the legal fees of kshs.50,000/=.
    - v. The learned magistrate erred in law and in fact in finding that the Plaintiff is not entitled to a refund of goodwill paid of kshs. 300,000/=.
    - vi. The learned magistrate erred in law and in fact in failing to consider the facts of the case against the evidence on record and the applicable law thus arriving at the wrong conclusion. The learned magistrate applied a higher burden of proof in evaluating the plaintiff evidence and thereby fell in error.
    - vii. The learned magistrate failed to appreciate the fact that there was no consideration for the payments made to the Defendant.
  7. In view of the pleadings, evidence and the grounds of appeal raised above, this court deduces the following issues for determination:
    - i. Whether this Court is vested with jurisdiction to hear and determine the instant appeal; and
    - ii. If the answer to the foregoing is in the affirmative, whether the appeal herein is merited.
  8. It is trite law that the duty of the appellate court faced with a first appeal is to re-evaluate and subject the evidence submitted before the trial court to a fresh analysis so as to reach an independent decision as to whether the trial court erred in it reaching its conclusions.
  9. Be that as it may, this court notes from the outset that the gist of the dispute of before Magistrate Court related to a transaction over a premise that was earmarked for lease to the appellant pursuant to a letter of offer dated 5<sup>th</sup> August 2019 whose terms the appellant avers it complied with.
  10. Even though the question of jurisdiction of this Court was never raised, the court is mindful of the provisions of Section 13(2), (d) & (e) of The *Environment and Land Court Act* enacted pursuant to the provisions of Article 162 (3) of the *Constitution* which vests exclusive original and appellate jurisdiction on the Environment and Land Court on all matters pertaining to contracts, choses in action or other instruments granting enforceable interests in land and indeed any other dispute over land.



11. Section 13(2)(d) &(e) of the *Environment and Land Court Act* provides thus:

“ ...

- (d) Relating to public land, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land
- (e) any other dispute relating to environment and land.” (emphasis added)

12. The *Constitution* under Article 260, thereof, on the other hand, renders a definition of land as follows:

“land” includes—

- (a) the surface of the earth and the subsurface rock.
- (b) any body of water on or under the surface; (c) marine waters in the territorial sea and exclusive economic zone;
- (d) natural resources completely contained on or under the surface; and
- (e) the air space above the surface (emphasis added)

13. It must however be appreciated that even though the definition of land rendered in the *Constitution* is not all inclusive, it can be construed that land includes all permanent fixtures affixed on the surface of the earth.

14. Noteworthy, the Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others*, Civil Appeal No. 83 of 2016 [2017] eKLR, observed as follows: -

“(30) Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to ‘whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell’. As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well.....

(31) Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.”

(35) ...For land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or ground below it according to the purpose for which that land is adapted.” (emphasis added)

15. In the instant case, it is not in dispute that this appeal arose from a lease over immovable property falling within the definition of land expressed above.

16. In *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & Another* [2018] eKLR , Sila Munyao, J held: -

25. .... On my part, I would modify the above test, and hold the position that what is important when determining whether the court has jurisdiction, is not so much the purpose of the



transaction, but the subject matter or issue before court, for I think that the purpose of the transaction, may at times be different from the issue or subject matter before court. Let us take the transaction of a charge as an example. The predominant purpose of creating a charge is for one to be advanced some financial facilities. However, when it comes to litigation, the predominant issue may not necessarily be the money, but the manner in which the chargee, is exercising its statutory power of sale. Here, I trust that you will see the distinction between the predominant purpose of the transaction and the predominant issue before court. That is why I hold the view, that in making a choice of which court to appear before, one needs to find out what the predominant issue in his case is, and not necessarily, the predominant purpose of the transaction. If the litigant's predominant issue will touch on the use of land, or occupation of land, or a matter that affects in one or another, title to land, then such issue would fall for determination before the ELC" (emphasis added)

17. In the case cited above, it can be gleaned that the Learned Judge adopted the "predominant issue test" in construing where jurisdiction would lie in a suit raising wide ranging issues cutting across jurisdiction of various courts.
18. Applying this test to the instant case, the court notes that the issues raised in this appeal not only relate to a claim for refund of monies allegedly paid but also whether the suit premises were habitable as well as whether the appellant had been allowed its vacant possession which issues ideally should be canvassed before the Environment and Land Court.
19. Even if one was to apply the predominant purpose test adopted by the Court of Appeal in the case of *Co-operative Bank of Kenya Limited v Patrick Kang'ethe Njuguna & 5 others*, Civil Appeal No. 83 of 2016 [2017] (*supra*), a review of the pleadings filed before the trial court as well as the grounds of appeal canvassed in this appeal reveal that the dominant purpose of the transaction entered between parties herein was to confer a lease over the suit property on the appellant.
20. Needless to state, both the purpose and issues arising from the impugned transaction are predominantly within the province of the Environment and Land Court.
21. This court thus finds that it is divested of jurisdiction to hear and determine the instant appeal per the express provisions of Article 162 of the *Constitution* as read with those of Section 13 of the *Environment and Land Court* which vest exclusive jurisdiction on the matters at hand before the Environment and Land Court.
22. In this regard, the court is further guided by the decision of the Supreme Court in *Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others* [21012] eKLR where it was held that a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law and that it cannot arrogate itself jurisdiction exceeding that which is conferred by law.
23. This Court, being mindful of the import of the decision of the Court of Appeal in *The Owners of Motor Vessel "Lillian S" v. Caltex Oil Kenya Ltd* [1989] KLR 1 has no choice but to down its tools.
24. For the reasons expressed above, I do find that this appeal is incompetent and is thus struck out.
25. There shall be no order as to costs however, as the respondent never raised the question of jurisdiction in its submissions in opposition of the appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 9<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**A. C. BETT**



## **JUDGE**

In the presence of:

Githiru for appellant

Ongeri for Respondent

Court Assistant: Polycap

