



REPUBLIC OF KENYA



Chinya Development Company Limited & another v Kayser Investment Limited (Commercial Appeal E089 of 2021) [2023] KEHC 17279 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E089 OF 2021**

DAS MAJANJA, J

MAY 12, 2023

BETWEEN

CHINYA DEVELOPMENT COMPANY LIMITED 1ST APPELLANT

YAN JIAAI 2ND APPELLANT

AND

KAYSER INVESTMENT LIMITED RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. Lewa, PM dated 20th September 2021 at the Nairobi Magistrates Court, Milimani in MC COMMSU No. E919 of 2021)

RULING

1. This is the first appeal against the judgment of the Subordinate Court where it granted the Respondent the following reliefs against the Appellants; a declaration that the lease agreement is repudiated by the Defendants' breach, vacant possession, rent arrears in the sum of Kshs 665,550.00 as of June 2021, rent at the rate of Kshs 47,050.00 per month for the month of July 2021 and Kshs 50,500.00 per month until vacant possession, costs in demanding rent arrears, auctioneers and BPRT costs of Kshs 232,000.00, exemplary damages in the sum of Kshs 500,000.00, interest and costs.
2. The Respondent commenced the suit by the Plaint dated July 1, 2021. From the reliefs granted by the Subordinate Court, it is clear that the parties were in a landlord and tenant relationship in respect of Shop No 18 (formerly 20) situated on a property owned by the Respondent known as Dragon Village, LR No 1/229, Argwings Kodhek Road, Nairobi. The Respondent case was that the Appellants had breached the lease agreement dated July 21, 2017 by, inter alia, failing to pay rent.
3. The court entered interlocutory judgment as the Appellant failed to enter appearance and file defence despite being served with summons to enter appearance. The matter thereafter proceeded for formal



proof where the Appellant's witness, Dorothy Mbae, testified. In its judgment the court held that the Appellant's evidence was not controverted and as such it had proved its case on the balance of probabilities. It is this judgment that has precipitated this appeal.

4. The respondent filed a notice of preliminary objection dated October 13, 2021 objecting to the appeal on the ground that this court lacks jurisdiction to entertain the appeal. The objection was urged by way of written submissions.
5. The Respondent submits that the parties are in a landlord and tenant relationship and that its suit before the Subordinate Court primarily seeks to recover rent and vacant possession. It contends that under section 13 of the [Environment and Land Court Act, 2011](#), this appeal ought to have been filed at the Environment and Land Court ("the ELC") which has exclusive jurisdiction over such an appeal. In support of this argument, the Respondent cites [Ideal Locations Limited v Nakumatt Holdings Limited and Another](#) [2018] eKLR where the court held that where the dispute involving the landlord and tenant relationship relating to non-payment of rent for the premises then it relates to the uses and occupation of land and is therefore within the jurisdiction of the ELC. Citing [Wilfred Ontube Makori v Kenya Electricity Transmission Co Ltd and Another](#) [2020] eKLR, the Respondent urges that since the nature of the case is not disputed, the court has option but to strike out the appeal as this court lacks jurisdiction.
6. The Appellant does not dispute the nature and scope of the jurisdiction of the ELC under the [Environment and Land Court Act](#). It rebuts the Respondent contention that this case falls within the jurisdiction of that court based on the argument that the predominant issue on dispute is breach of the alleged lease and failure to pay rent and not a dispute relating to the environment and use and occupation of, and title to land as envisaged in Article 162(2)(b) of the [Constitution](#). It relies on [Suzanne Butler and 4 others v Redhill Investments and Another](#) [2017] eKLR where it was held that where the court is faced with the question whether a land dispute before it should be litigated at the ELC or the High Court, the court should utilize the predominant purpose test. The test being whether the transaction is predominantly for the provision of goods, construction, services etc., on one hand or the use of and occupation and title to land. It also submits that in [Cooperative Bank of Kenya Limited v Patrick Kangethe](#) [2017] eKLR, the Court of Appeal settled the law and determined that the ELC jurisdiction to deal with disputes connected to "use" of land do not include mortgages, charges, collection of dues and rents which are all matter within the civil jurisdiction of the High Court.
7. In the famous case of [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] KLR 1, Nyarangi JA, observed that, "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction." Since the issue of jurisdiction has been raised this court is obliged to consider it.
8. From the facts of the case, the dispute involves non-payment of rent, breach of the lease agreement and a claim for vacant possession. This court is bound by the decision of the in [Cooperative Bank of Kenya Limited v Patrick Kangethe](#) [2017] eKLR where the court held that disputes involving mortgages, charges, collection of dues and rent fall within the civil jurisdiction of the High Court and not the ELC. If the matter in dispute in this case involved the collection of rent or breach of the lease only, then the court would have no difficulty ruling that the High Court has jurisdiction. But in this case, Appellant is in occupation of the suit premises and it effectively resists giving up vacant possession. The Respondent contends that since the Appellant has breached the lease and failed to pay the outstanding



rent, it is entitled to vacant possession hence I cannot say that the case is merely one of collection of a debt as the Appellant has resisted the giving up vacant possession to the extent of filing proceedings at the Business Premises Rent Tribunal from which an appeal lies to the ELC. The Appellant even lodged an appeal to the ELC from the decision of the Tribunal dismissing its reference before that Tribunal. In my view, the predominant purpose of the Respondent's suit is to terminate the lease and obtain vacant possession which I hold are matters within the province of the ELC.

9. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the [Environment and Land Court Act](#), which states as follows:

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the [Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the [Constitution](#), the Court shall have power to hear and determine disputes –

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

10. Section 13(d) of the [Environment and Land Court Act](#), covers disputes relating to leases, being contracts or instruments that grant enforceable interests in land. A lease creates an interest in favour of the lessee in the property of a lessor, which is registrable and enforceable. Thus any disputes that arise with respect to leases also fall within section 13(d) of the [Environment and Land Court Act](#) and therefore within the jurisdiction of the ELC.

11. For the reasons I have set out above, I find and hold that this court lacks jurisdiction to entertain this appeal as the appeal ought to have been filed in the Environment and Land Court. I therefore make the following dispositive orders:

a. This appeal be and is hereby struck out.

b. The Appellant shall pay costs of the appeal assessed at Kshs 25,000.00.

c. The orders in this appeal shall apply to HC COMMA No E090 of 2021, *Huang Xia v Kayser Investment Limited*.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY 2023.

D. S. MAJANJA

JUDGE



Court Assistant: Mr M. Onyango.

Mr Mulama instructed by CK Advocates for the Appellants

Mr Ataka instructed by AKO Advocates for the Respondent.

