



REPUBLIC OF KENYA



KENYA LAW

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KIWASCO (Kisumu Water & Sanitation Company Ltd) v Touch (Civil Appeal E051 of 2021) [2023] KEHC 3976 (KLR) (2 May 2023) (Judgment)

Neutral citation: [2023] KEHC 3976 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E051 OF 2021**

RE ABURILI, J

MAY 2, 2023

BETWEEN

KIWASCO (KISUMU WATER & SANITATION COMPANY LTD) .. APPELLANT

AND

WILLIAM ROMAN MC TOUCH RESPONDENT

(Being an appeal from the Ruling of R.K. Ondiek delivered on 28th April 2021 in Kisumu CMCC No. 567 of 2017)

JUDGMENT

Introduction

1. The appellant herein filed an application dated August 14, 2020 seeking to strike out the respondent's suit for want of jurisdiction on the main ground that where a dispute over water services concerns a business contract, the same ought to be heard and adjudicated by the Water Disputes Tribunal.
2. In response, the respondent herein contended that the section relied on by the appellant was appellate in nature and was only invoked upon a decision being made by the Water Regulatory Board and thus the magistrate's court had the jurisdiction to hear and determine the matter.
3. In his ruling, the trial magistrate found that the respondent had approached the court seeking injunctive relief which was within the jurisdiction of the magistrates' court as it was not provided for in the *Water Act*. The trial court proceeded to dismiss the appellant's application objecting to jurisdiction of the lower court dated August 14, 2020.



4. Aggrieved by that ruling, the appellant lodged its memorandum of appeal dated May 20, 2021, raising the following grounds:
- a. That the learned trial magistrate erred in law and fact in failing to find and hold that the dispute before the trial court was a dispute between a water service provider and its customers relating to a business contract.
 - b. That the learned trial magistrate erred in law and fact by failing to find and hold that the dispute before it being a dispute between a water service provider and its customers relating to a business contract and the disputants having failed to agree on an alternative dispute resolution mechanism, resolution of the same became the preserve of the Water Tribunal by dint of the provisions of section 82 and 121 (2) of the *Water Act* 2010.
 - c. That the learned trial magistrate erred in law by failing to find and hold that the magistrate's court in law lack jurisdiction to hear or determine disputes between water service providers and its customers relating to the business contract inter se.
 - d. That the learned trial magistrate in clear disregard of the provisions of section 121 (1) of the *Water Act* 2016 erred in law and fact by finding and holding that the dispute before trial court, without even setting out what the dispute is, does not qualify to fall within the jurisdiction of the water tribunal.
 - e. That the learned trial magistrate erred in law by failing to appreciate that jurisdiction is everything in law and that the issue ought to be determined in limine and the same cannot be donated by any amount of judicial craft as he did.
 - f. That the learned trial magistrate erred in law by attempting to limit the jurisdiction of the Water Tribunal as clearly set out under Section 121 (1) of the *Water Act* 2016 by introduction of lofty terms such as "civil jurisdiction platform" and "civil wrong" and judicial craft just so as to grant the court jurisdiction where it lacks in law.
 - g. That the learned trial magistrate erred in law and fact by trivializing the issue of jurisdiction under the guise of hesitancy to strike out a litigation on account of affidavits.
 - h. That the learned trial magistrate erred in law by introducing the issue of requirement of proof of issuance of notice as prerequisite to the determination of the issue whether or not the trial court has jurisdiction in law when under section 121 (1) of the *Water Act* 2016 the law made no such requirement.
 - i. That the learned trial magistrate erred in law by holding that the jurisdiction of the Water tribunal in law can only be invoked after a determination by the Water Regulatory Board and its appellate contrary to the original jurisdiction donated by section 121 (2) of the *Water Act*.
 - j. That the learned trial magistrate erred in law and fact by interchangeably using the words Water Regulatory Board and the Water Tribunal as if they meant



one and the same entity thereby leading to an erroneous decision to dismiss the application dated August 14, 2020.

- k. That the trial learned magistrate erred in law by dismissing the application dated August 14, 2020 as unmerited when the contrary is true.

5. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

6. It was submitted that in order to establish whether or not a court or tribunal has jurisdiction to hear or determine a matter recourse is had to either the Constitution or statute or both as held by the court in the case of Peter Masakwi Mogori v Kenya Commercial Bank Limited & 2 Others [2020] eKLR and further in the case of The Board of Management Murang'a High School (Suing on Behalf of Murang'a High School) v Water Regulatory Board & 2 Others; James Muchoki Muthoni (Interested Party).
7. The appellant submitted that by the respondent's own admission the case before the lower court related to a dispute between a consumer (plaintiff/respondent) and a water service provider (defendant/appellant) where the respondent sought a permanent injunction against from the appellant from disconnecting his water supply into his hotel.
8. It was submitted that section 121(2) of the Water Act granted the Water Tribunal the power to hear and determine any dispute concerning water resources or water services where there was a business contract unless the parties have otherwise entered agreed to an alternative dispute mechanism.
9. The appellant submitted that Section 7 of the Magistrates Court Act clothed the magistrates court with jurisdiction to hear and determine civil cases only of the nature that the Constitution or any statute does not create a specialised court specifically to hear and determine.

The Respondent's Submissions

10. It was submitted that there was no competent appeal filed as the appellant needed leave of the court to file the appeal as provided under section 16 of the Civil Procedure Act and Order 43 Rule of the Civil Procedure Rules 2010 and thus the appeal ought to be dismissed with costs to the respondent.
11. The respondent submitted that the section 121 presupposes that a decision has been made and communicated upon which the party dissatisfied invoked the appellate jurisdiction. It was further submitted that the dispute herein was civil in nature as the respondent had sought injunctive orders against the appellant.

Analysis and Determination

12. Having considered the grounds of appeal and submissions, the main issue for determination in this appeal is two-fold –whether the lower court and whether this court have jurisdiction to hear and determine the suit and the appeal herein. Before I answer the twin question, I must reevaluate the material before the trial court and arrive at my own independent conclusion, although the subject before this court is a ruling arising from an application objecting to jurisdiction of the trial court to hear and determine the suit.
13. This is a first appeal. Thus, the duty of the court in is to subject the evidence in the trial court to re-appraisal, being careful to note that this court did not have the opportunity of seeing and hearing the witnesses first hand. This position was well stated in Selle & Another v Associated Motor Boat Co Ltd



Et Others (1968) EA 123. Once then court has reappraised the evidence, it need not follow the trial judge's findings of fact. This is especially so:

“..... if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”. See the case of *Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 EA CA 270*.

14. In the lower court, the appellant filed an application dated August 14, 2020 seeking to strike out the respondent's suit for want of jurisdiction on the main ground that where a dispute over water services concerns a business contract the same ought to be heard and adjudicated by the Water Tribunal. In response the respondent herein stated the section relied on by the appellant was appellate in nature and was only invoked upon a decision being made by the Water Regulatory Board and thus the magistrate's court had the jurisdiction to hear and determine the matter.
15. The locus classicus on jurisdiction is the renowned case of *Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd [1989] KLR 1* in which Nyarangi J held that;
'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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'
16. The courts have held that the question of jurisdiction must be raised at the earliest opportune time and once raised either by a party or by the court 'suo moto' it must be decided forthwith on the evidence before it; and 'it is immaterial whether the evidence is scanty or limited'; (See the case of *Owners and Masters of the vessel 'Joey' v Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2007] eKLR*; therefore "as soon as it is raised the court should hear and dispose of that issue without further ado;")
17. Where does a court's jurisdiction come from; in the case of *SK Macharia v KCB Et 2 others* Civil Application No 2 of 2011 and 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.
.....Where the Constitution confers upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.'
18. Therefore, where a statute has provided for mechanism of dispute resolution the court cannot abrogate that mechanism; a litigant must exhaust the said mechanism before moving to the next level; there is a plethora of case law on the issue of the 'exhaustion doctrine' which have clearly stated that the courts ought to be the last resort and not the first port of call the moment a storm brews.
19. The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru Et 2 Others v Samuel Munga Henry Et 1756 Others [2015] eKLR*, where it stated that: -

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial



consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

20. The rationale was aptly pronounced by the bench in the Matter of Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR where the High Court stated thus: -

"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that Courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."

21. A dispute resolution mechanism has been provided for in Section 121 of the Water Act which states as follows;

- "(1) The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.
- (2) In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism."

22. Clearly, the proceedings before the lower court are not in the nature of an appeal against the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under their authority.

23. A cursory look at the facts set out in the pleadings by the parties, it is sufficient to conclude that the dispute is centered on the provision of water services by the appellant to the respondent; and it is also evident that the appellant has a business contract with the respondent.

24. For the forgoing reasons, this court finds that the issues herein are commercial, the dispute relates to a commercial issue on an outstanding bill for the respondent's account and it is this courts considered opinion that the respondent chose the wrong forum to address his grievances; the proper forum in the first instance for ventilating the issues relating to agency, 'privity of contract' and the indolence of the appellant is the Water Tribunal; and therefore the jurisdiction enjoyed by the Magistrates Court cannot oust the jurisdiction of the Water Tribunal.

25. For those reasons, this court reiterates that the best suited forum to canvass these issues would be the Water Tribunal and therefore the Magistrates court lacked jurisdiction to determine the suit before it.



26. The second aspect of the jurisdiction complained of by the respondent is that the appellant did not seek leave to appeal to this Court as there was no automatic right of appeal from the ruling of the trial magistrate hence this court has no jurisdiction to hear and determine this appeal.

27. Section 75 of the *Civil Procedure Act* on “Orders from which Appeals lie provides as follows:

- (1) An appeal shall be as of right from the following orders and shall also lie from any other order with leave of the Court making such Order of the Court to which an appeal would lie if leave were granted:
 - (a) An order superseding an arbitration where the award has not been completed within the period allowed by the Court.
 - (b) An order on an award stated in the form of a special case.
 - (c) An Order modifying or correcting an Award
 - (d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration
 - (e) An order filing or refusing to file an award in an arbitration without the intervention of the court
 - (f) An order under section 64 of the Act
 - (g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree
 - (h) Any order made under these rules from which an appeal is expressly allowed by rules
- (2) No appeal shall lie from any order passed in appeal under this section.

28. On the other hand, Order 43 of the *Civil Procedure Rules* gives a long list of orders from which an appeal lies from as of right. It therefore follows that if one wishes to appeal on an order that is not on the list under Order 43 of the *Civil Procedure Rules*, one must seek leave of court. The said Order 43 is the procedural Order for section 75 of the *Civil Procedure Act*. It provides for:

“Appeals from Orders”

An appeal shall lie with as of right from the following orders and rules under the provisions of section 75 (1)(h) of the Act:

- (a) Order 1 (parties to suits);
- (b) Order 2 (pleadings generally);
- (c) Order 3 (frame and institution of suit);



- (d) Order 4, rule 9 (return of plaint);
- (e) Order 7, rule 12 (exclusion of counterclaim);
- (f) Order 8 (amendment of pleadings);
- (g) Order 10, rule 11 (setting aside judgment in default of appearance).
- (h) Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
- (j) Order 19 (affidavits);
- (k) Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);
- (m) Order 24, rules 5, 6 and 7 (legal representatives);
- (n) Order 25, rule 5 (compromise of a suit);
- (o) Order 26, rules 1 and 5(2) (security for costs);
- (p) Order 27, rules 3 and 10 (payment into court and tender);
- (q) Order 28, rule 4 (orders in proceedings against the Government);
- (r) Order 34 (interpleader);
- (s) Order 36, rules 5, 7 and 10 (summary procedure);
- (t) Order 39, rules 2, 4 and 6 (furnishing security);
- (u) Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
- (v) Order 41, rules 1 and 4 (receivers);
- (w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);
- (x) Order 45, rule 3 (application for review);
- (y) Order 50, rule 6 (enlargement of time);
- (z) Order 52, rules 4, 5, 6 and 7 (advocates);
- (aa) Order 53 (judicial review orders).
 - a. An appeal shall lie with the leave of the court from any other order made under these Rules.
 - b.
 - c.



29. This court has the jurisdiction to hear and determine appeals from tribunals, subordinate courts or bodies as prescribed by Article 165 of the Constitution and other Acts of Parliament. Nonetheless a party who desires to file an appeal to this court has a duty to demonstrate under what law that right to be heard on an appeal is conferred or if not, show that leave has been granted by the court that made the order which is impugned to lodge the appeal before the court.
30. The above position was espoused by the Court of Appeal in Nyutu Agrovet Ltd v Airtel Networks Limited (2015) eKLR. The court in the above decision also held that leave to appeal does not constitute the right to appeal. The right must precede leave. The Court of Appeal in the above Nyutu Agrovet Ltd case (supra) cited with approval the decision by Ringera J (as he then was) in Nova Chemicals Ltd v Alcon International Ltd HC MISC APPL 1124/2002 where the learned judge held that:
- “ the point of departure must be the recognition that the right of appeal, with or without leave, must be conferred by statute and the same is never to be implied”.
31. The Court of Appeal further stated that:
- “and even Section 75 of the Civil Procedure Act, giving this court jurisdiction to hear appeals from the High court, should be read to mean that these provisions of law also confer the right of appeal on the litigants. The power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before this court. To me, even if jurisdiction and the right of appeal may be referred to side by side or in the same breath, the two terms do not mean one and the same thing. It is not in dispute that jurisdiction as well as the right of appeal must be conferred by law, not by implication or inference. If the power and authority of or for a court to entertain a matter (jurisdiction) is not conferred by law then that court has no business to entertain the matter. (see owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Ltd (1989) KLR 1.”
32. I have examined the ruling made by the trial court dismissing the application that objected to the jurisdiction of the trial court. It does appear that there is no clear provision of the law under which the trial court made the order. However, as the order was based on objection to jurisdiction of the court, it could be made under the inherent jurisdiction of the court as stipulated in section 3A of the Civil Procedure Act, or under section 3 of the Civil Procedure Act.
33. The proceedings before the subordinate court, subject matter of this application were and are civil proceedings governed by the Civil Procedure Act and Rules made there under. However, I find no provision that confers upon the appellant the” right of appeal” under the inherent or special jurisdiction of the court under the Civil Procedure Act..
34. The Court of Appeal in CA Nairobi 86 of 2015 Peter Nyaga Murake v Joseph Mutunga, referring to failure to seek leave to appeal from an order stated as follows:
- “ without leave of the High Court, the applicant was not entitled to give Notice of Appeal where, as in this case, leave to appeal is necessary by dint of Section 75 of the Civil Procedure Act and Order 43 of the Civil Procedure Rules, the procurement of leave to appeal is sine qua non to the lodging of the Notice of Appeal. Without leave, there can be no valid Notice of Appeal. And without a valid Notice of Appeal, the jurisdiction of this court is not properly invoked. In short, an application for stay in an intended appeal against an order which is appealable only with leave which has not been sought and obtained is dead in the water.”



35. The upshot of the above is that either way, the trial court had no jurisdiction to hear and determine the suit before it as there is an alternative forum stipulated in law being the Water Tribunal. On the other hand, the appellant herein ought to have sought leave of court before filing this appeal from the ruling of the trial court which was on jurisdiction of the court. For the above reasons, albeit the appeal herein is found to be incompetent and is therefore struck out, there being no jurisdiction of the lower court to hear and determine the suit before it, I would not remit the matter for hearing before the said court which is devoid of such jurisdiction but proceed to invoke the provisions of Article 165(6) and (7) of the Constitution and call into this court the record and proceedings in Kisumu CM CC No 567 of 2017, in exercise of this Court's supervisory jurisdiction over subordinate courts and I proceed to quash the said record and proceedings and the Ruling of Hon RK Ondiek delivered on April 28, 2021 in Kisumu CMCC No 567 of 2017 is hereby set aside and vacated. In its place, this court proceeds to strike out the suit and application filed by the respondent in the lower court.
36. Each party shall bear their own costs of the suit and the application in the lower court and costs of this appeal as it was the duty of the trial court to investigate and establish whether it had the necessary jurisdiction to determine that question of jurisdiction at that stage to avoid parties escalating the dispute to this court.
37. I so order and proceed to close this file.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 2ND DAY OF MAY, 2023

R E ABURILI

JUDGE

