



REPUBLIC OF KENYA



Fuks t/a Shakatak Disco v Diani Properties Limited & 2 others (Civil Case E025 of 2022) [2023] KEHC 22193 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22193 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E025 OF 2022
F WANGARI, J
JULY 7, 2023**

BETWEEN

JURGEN FUKS T/A SHAKATAK DISCO PLAINTIFF

AND

DIANI PROPERTIES LIMITED 1ST DEFENDANT

COSTSWOLD ESTATE LIMITED 2ND DEFENDANT

JOEL TITUS MUSYA T/A MAKURI AUCTIONEERS 3RD DEFENDANT

RULING

1. The Plaintiff instituted suit against the Defendants jointly and severally for the following reliefs: -
 - a. Special damages of Kshs 56,284,270/= as particularized and outlined above;
 - b. Loss of business at Kshs 35,000/= per day from August 4, 2021 to April 9, 2022 when the Plaintiff re-opened totaling to Kshs 8,715,000/=
 - c. General damages for trespass, wrongful seizure and conversion;
 - d. General damages for psychological trauma and illegal distress of the Plaintiff's goods;
 - e. Exemplary and aggravated damages;
 - f. Costs of the suit plus interest at court rates of 14% per annum from the date of judgement till payment in full;
 - g. Any other relief.
2. Upon service of the pleadings, the Defendants entered appearance and filed a statement of defence. Contemporaneously with the defence, they raised a notice of preliminary objection on the grounds that this court lacked jurisdiction by virtue of express provisions of Article 165 (5) (b) of the



Constitution. According to the Defendants, the dispute arises out of a dispute between a landlord and a tenant for the recovery of rent arrears and as such, the High Court has no jurisdiction to hear or determine the dispute relating to use and occupation of land since such jurisdiction is conferred upon the Environment and Land Court.

3. Directions were taken that the preliminary objection be disposed off by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions.

Analysis and Determination

4. I have considered the parties' pleadings, the preliminary objection, the submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;

- a. Whether the preliminary objection is merited;
- b. Who bears the costs?

5. On the first issue, the Defendants have raised a preliminary objection on the basis of Article 165 (5) (b) of the Constitution. The cited part provides as follows: -

(5) The High Court shall not have jurisdiction in respect of matters –

- a)
- b) falling within the jurisdiction of courts contemplated in Article 162 (2).

6. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of 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.”

At page 701, Sir Charles Newbold, P added: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

7. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or application.



8. I am satisfied that as per the case of Mukisa Biscuit (above), jurisdiction is a point of law which is enough to dispose off a suit. In the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, J.A. had the following to say: - "...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..."
9. The Defendants contend that the suit arises out of a dispute between a landlord and a tenant and thus is a reserve of the Environment and Land Court. However, the Plaintiff posits that though the dispute emanated from a landlord tenant relationship, what he is seeking is recovery of damages and the legality of the distress for rent.
10. In *Benson Ambuti Atega & 2 Others v Kibos Distillers Limited & 5 Others* [2020] eKLR, the Supreme Court while dealing with a preliminary objection on the issue of jurisdiction noted that in determining whether a court has jurisdiction or not, a key consideration would be the nature of the prayers sought. Having considered the plaint, I entirely agree with the parties that the relationship was a landlord – tenant one. Superficially, one can quickly say that this is matter meant for the Environment and Land Court. However, that would be, as put above, considering it superficially. Though, admittedly, the Plaintiff and the 1st Defendant were in a landlord – tenant relationship. The Plaintiff is not seeking to enforce his rights under the tenancy relationship. He is simply seeking for reliefs based on what transpired when the Defendants distrained against him. At this juncture, none of the parties adduced any affidavit evidence on whether there was still in existence a landlord – tenancy relationship. Be that as it may, having considered the plaint, I have no hesitation to hold that the reliefs sought relate to what transpired after the alleged illegal distress. It is not on the distress process but the results. I think I have said enough to show that this suit is properly before this court and it shall be considered on its merits. Whether the claim is successful or not shall be determined through evidence as postulated under sections 107 – 109 of the *Evidence Act*.
11. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. This is a preliminary application and having sustained the suit, the only order that lends itself on costs is that the same shall abide the outcome of the suit.
12. Following the foregone discourse, the upshot is that the following orders do hereby issue;
 - a. The Notice of Preliminary Objection dated May 12, 2022 is without merit and is hereby dismissed;
 - b. Costs to abide the outcome of the suit.Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

F. WANGARI

JUDGE

In the presence of;

Kiptum Advocate h/b for Gikandi Advocate for the Plaintiff

Anangwe Advocate h/b for Kinyua Advocate for the Defendants

