



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

CIVIL APPEAL NO. 17 OF 2018

BETWEEN

SHAZEEN CHATUR.....APPELLANT

AND

PRAMUKH CASH AND CARRY LIMITED.....RESPONDENT

(Being an Appeal from the Ruling and Order in Kisumu CMCC No. 629 of 2017

by Hon. J.Ngarngar (CM) on 28th February, 2018)

JUDGMENT

1. **PRAMUKH CASH AND CARRY LIMITED** (*hereinafter referred to as Respondent*) sued **SHAZEEN CHATUR** (*hereinafter referred to as fith Appellant*) in the lower court claiming an order of injunction to restrain the Appellant from terminating the lease agreement between them and from evicting or interfering with the Respondent's quite possession of the lease premises until the expiry of the lease.

2. By a notice of a preliminary objection dated 19th December, 2017 and filed on even date, the Appellant asserted that the subject matter of the suit was beyond the pecuniary jurisdiction of the magistrate's court and could either be heard by the High Court or the Business premises rent Tribunal.

3. The preliminary objection was vehemently opposed by the Respondent which argued tat the issue in dispute was not the value of the subject matter but the tenancy agreement.

4. By a ruling dated **28th February, 2018**, the court dismissed the preliminary objection on the ground that the issue in dispute was not the value of the property but the tenancy and payment of rent whose sum was within the pecuniary jurisdiction of the court. The court similarly found that the issue of the Respondent's authority to counsel to sue and the swearing of an affidavit by a person without the authority of the Respondent did not affect the substance of the suit.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision on 02nd November, 2018 filed the Memorandum of Appeal dated 19th March, 2018 which sets out seven (7) grounds which I have summarized into two 2 grounds that: -

1) The trial court arrogated itself of jurisdiction to hear a matter whose jurisdiction it does not have

2) The trial court failed to find that the suit was fatally defective

SUBMISSIONS BY THE PARTIES

6. When the appeal came before me for mention for directions on 29th November, 2018, the parties' advocates agreed to I dispose it off by way of written submissions which they dutifully filed.

Appellant's submissions

7. Appellant holds the view that the suit is defective for the reason that the Respondent's suit was not sanctioned by the Board of Directors and that there was no resolution to appoint the firm of Omondi, Abande & Company Advocates to represent the Respondent. In support of this proposition, the Appellant relied on Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696; East African Portland Cement Ltd v The Capital Markets Authority & 5 Ors [2014] eKLR, Bugerere Coffee Growers Ltd v Seraduka & Anor. (1970) EA 147, East African Safari Air Ltd v Anthony Kegode & Anor [2011] eKLR and Bugerere Coffee Growers Ltd v Seraduka & Anor. (1970) EA 147.

8. On substantive justice, the Appellant submitted that the provisions of Article 159(2)(d) should not be used by litigants as a panacea to all irregularities and procedural technicalities and in support thereof relied on Joshua Werunga v Joyce Namuyak (2013) eKLR and Raila Odinga v I.E.B.C & Others (2013) eKLR where the Supreme Court in the latter case said that

Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court."

9. The Appellant argued that the dispute was about the business premises and that the trial court had no jurisdiction. Reliance was placed on Lady Justice Kalpana H. Rawal & 2 Others v Judicial Service Commission & 6 others [2016] eKLR where Ibrahim JSC quoted of Ocheja Emmanuel Dangana v Hon. Atai aidoko Aliusman & 4 Others, SC. 11/2012 (The Dangana case) with approval where Walter Samuel Nkanu Onnoghen, JSC wrote with regard to jurisdiction thus:

"It is settled law that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity-dead- and of no legal effect whatsoever. That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost."

Respondent's submissions

10. The respondent submitted that the issue before the trial court was not about ownership of the lease premises but a commercial dispute based on a tenancy agreement.

11. The Respondent asserted that the suit was competent for the reason that the filing of the same by the firm of Omondi, Abande & Company Advocates had been ratified by the Respondent's board resolution dated 20th December, 2017 which were duly filed. In support thereof, Respondent relied on Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR where Havelock J (as he then was) cited with authority the decision by Hewett, J. (as he then was) in Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000 as follows:

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.

Analysis and Determination

12. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. (See Sumaria & Another -Vs- Allied Industrial Ltd (2007)2KLR and Selle & Another -Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123.) It then behooves this court to summarize the evidence that was tendered before the trial court.

13. I have perused the entire record of appeal and considered the submissions of counsels for both parties and I have deduced the issues for determination as follows:

a) Whether the Defendant's Notice of Preliminary Objection is merited

14. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a "demurrer". The *locus classicus* on Preliminary Objection is the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696, where Law J.A. stated:

"So far as I am aware, 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."

15. Sir Charles Newbold, President stated in the same judgment as follows: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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.”

16. A reading of the pleadings in **Kisumu CMCC No. 629 of 2017** discloses that that Respondent’s claim against the Appellant is for an order of injunction to restrain the Appellant from terminating the lease agreement between them, and from evicting or interfering with the Respondent’s quiet possession of the lease premises until the expiry of the lease.

17. Neither of the parties pleaded the value of the lease premises nor does the issue arise by clear implication out of pleadings. Similarly, the pleadings do not disclose a dispute concerning payment of rent.

18. The Respondent sought an order of an injunction which the trial court rightfully found that it had jurisdiction to entertain under the provisions of Order 40 of the Civil Procedure Rules.

b) Whether the suit is fatally defective

19. It has been conceded by the Respondent that the suit was filed without a resolution from the board of directors. It has also been conceded the Respondent’s board did not formally authorize the firm of Omondi, Abande & Company Advocates to represent the respondent. to institute this suit for and on behalf of the Plaintiff.

20. The court record reveals that a day after the filing of the Preliminary Objection before the trial court, the Respondent’s board ratified the filing of the suit by **the firm of** Omondi, Abande & Company Advocates and authorized Mr. Mahesh G. Patel to represent it in the suit. The Resolution by the board was placed before the court for its consideration together with the preliminary objection.

21. Concerning this issue, the trial learned trial magistrate stated as follows:

“I would rather be guided by Article 159 of the Constitution. I do subscribe to the school of thought that justice ought to be administered without undue regard to technicalities”.

22. Procedure is a hand maiden of just determination of cases and as was stated in **Joshua Werunga v Joyce Namuyak (2013) eKLR** and **Raila Odinga v I.E.B.C & Others (2013) eKLR**. Article 159(2)(d) of the Constitution simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court.

23. Following the enactment of **Sections 1A, 1B, 3 and 3B** of the **Civil Procedure Act** and **Article 159(2) (d)** of the **Constitution** however, the general trend has been that courts today place heavy premium on substantive justice as opposed to undue regard to procedural technicalities. A look at recent judicial pronouncements from all the three levels of court structure leaves no doubt that courts today abhor technicalities that impede dispensation of justice.

24. Consequently, I am in agreement with the trial court that substantive justice ought not to be sacrificed at the altar of procedural technicalities.

25. From the foregoing analysis, I am not persuaded that this appeal has merit. The same is disallowed with costs to the Respondent.

DATED AND DATED IN KISUMU THIS 03rd DAY OF October 2019

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Amondi/Okodoi

For the Appellant - Mr Bagada/Mr Ojuro

For the Respondent - Mr Sala/Mr Abande