



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 136 OF 2017

(CORAM: F. GIKONYO J.)

JAMII BORA KENYA LIMITED.....APPELLANT

Versus

ESTHER WAIRIMU MBUGUA.....1ST RESPONDENT

JAMII BORA (K) LIMITED.....2ND RESPONDENT

(An appeal from the Ruling of Hon. G. Mmasi (Mrs.), SPM dated 28.2.2017 in Milimani CMCCC No. 6326 of 2015)

JUDGMENT

1. The appellant herein was the 2nd Defendant in the trial Court. The 1st Respondent was the plaintiff whereas the 2nd Respondent was the 1st Defendant.

2. The respondent instituted the suit vide plaint dated 15th October 2015 where she alleged that on 30th April 2010 she entered into a lease agreement with the 1st Defendant (2nd Respondent herein) for a period of six (6) years at monthly rent of Kshs. 30,000/= which would be increased after every two years. That as from 5th April 2011 the 1st Defendant failed and/or neglected to pay the rent due.

3. It was the Respondents allegation that upon demand for the rent arrears she was informed that the 2nd Respondent had merged with City Finance Bank Ltd to form the Appellant. That she was further advised that the Appellant would not honour the Agreement between her and the 2nd Respondent.

4. The appellant filed its statement of Defence on 1st June 2016 and also raised the following Preliminary Objection to the entire suit: -

a) There is no privity of contract between the plaintiff and the 2nd Defendant as under Section 3 of the Law of Contract Act.

b) The lease was never registered as provided under Section 47 of the Registered Land Act Cap 300 Laws of Kenya (now repealed) or Section 54 of the Land Registration Act 2012.

c) Plot No. 813, Phase 8 Scheme Plan Number Nairobi/Block/82/187 was not approved by the Governor General Central Bank of Kenya under Section 8 of the Banking Act.

5. The Respondent filed a Reply to the Defence on 4th July 2016 contending that the Appellant was a party to the lease Agreement by reason of being the 2nd Respondent's Successor in title and thus liable.

6. The trial Magistrate upon consideration of the submission of parties held that whether or not a lease was registered is a matter of fact and not a point of law. It was also her considered view that the issue of privity of contract does not arise because City Finance bank merged with the 2nd Respondent and changed to become the Appellant on 12th March 2010 taking all assets and liabilities hence it has been properly sued. For those reasons, the trial magistrate dismissed the Preliminary Objection.

7. The appellant being aggrieved by the aforesaid decision filed this Appeal raising the following four (4) grounds of Appeal: -

(i) The trial magistrate erred in law and in fact by ignoring the Defendant evidence.

(ii) That the trial Magistrate erred in law and in fact by holding that there is privity of contract, yet the alleged lease agreement was executed month after the acquisition of Jamii Bora (K) Limited was finalised, a certificate of change of name issued and gazette notice published.

(iii) The Magistrate erred in law and in fact in failing to find that the transfer and acquisition of assets and liabilities of Jamii Bora Kenya Limited by City Finance Bank Ltd took place on 11th February 2016 months before the alleged lease agreement was executed.

(iv) The magistrate erred in law and in fact by failing to adhere to the doctrine of stare decisis when she held that the Preliminary Objection on grounds that the lease agreement was registered as under Section 47 of the Registered Land Act Cap 300 (now repealed) or Section 54 of the Land Registration Act 2012 do not constitute points of law.

Submissions

8. On 19th July 2019 this Court directed parties to file written submission which they now rely on to canvass the appeal.

Appellants Submissions

9. The Appellant condensed the Appeal into two issues; (i) whether the Appellant is privity to the alleged agreement between the 1st and 2nd Respondent; and (ii) Whether the alleged lease Agreement entered into between the 1st and 2nd Respondent is valid in Law. It submitted that at the time of execution, the merger between Jamii Bora Ltd and City Finance Bank Ltd had been effected, that is, 2nd February 2010. The purported lease was therefore not entered into with the Appellant and that the Appellant never made Rental Payments to the 1st Respondent. According to the Appellant, the 1st Respondent did not produce any records showing who has been paying rent. It relied on the cited authorities **Aincati Liluyani Njirah v Aga Khan Health Services [2013] eKLR & Laser View System Ltd v Cassam Acres Ld & Anor [2012] eKLR**.

10. The Appellant also submitted that the lease was entered into with a non-existent Company hence the person contracting is personally liable. On this point it relied on the cited authorities of **David Ndiritu & Anor vs Chase Bank (Kenya) Ltd (in receivership) & 2 Others [2018] eKLR**. Lastly the appellant submitted that the lease herein was not registered under Section 54 of the Land Registration Act or Section 47 of the R.L.A (now repealed) and/or approved by the Governor Central Bank of Kenya under Section 13 of the Micro Finance Act & Section 8 of the Banking Act.

Respondent's Submissions

11. The respondent submitted that whether a lease is registered or not is a matter of fact that should be determined in a full hearing. They argued further that, failure to register a lease does not render it invalid. To this end she relied on **Mukisa Biscuits Manufacturing Co. Ltd – V- West End Distributors Limited (1969) EA. 696, Chon Jeuk Suk Kim 7 Anor v E.J. Austin & 2 others [2013] eKLR**. She also submitted that Section 13 of the Microfinance Act & Section 8 of the Banking Act do not impose an obligation to the Landlord/1st Respondent. She relied on the maxim that “No man shall be allowed to take advantage of their wrong, and equity sees as done that which ought to be done. She placed reliance in **Nabro Properties Ltd v Sky Structures Ltd & 2 others**.

12. On privity of contract the 1st Respondent submitted that the appellant was the successor in title of the 2nd Respondent. That the appellant has not brought before this Court or the trial court evidence that the 2nd Respondent ceased to exist after the merger. That the executor of the lease did it on behalf of the appellant; i.e. Ingrid Munro, the co-founder of the 2nd Respondent and who is listed as a director of the appellant bank in the letter dated 7th December 2002 hence the appellant is estopped from denying the lease agreement when its lawful agent executed the lease. She cited the authority of **Kiplangat Arap Biator v Esther Toya Cheygon (2016) eKLR**.

ANALYSIS AND DETERMINATION

13. The first appellate court should re-evaluate the facts afresh and come to its own independent findings and conclusions. See the case of **Selle v Associated Motor Boat Co. & others [1968] E.A. 123**.

14. After considering the pleadings and submissions of the parties, this court must determine whether the trial court erred in dismissing the preliminary objection herein. In so doing, it is imperative to first establish whether the preliminary objection meets the test of the law.

Character of preliminary objection

15. In the opinion by Law JA in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS LTD (1969) EA 696: -**

“So far as I’m 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.”

1. Sir Charles Newbold in the same case stated that:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

16. In **ORARO VS. MBAJA [2005] 1 KLR 141 Ojwang, J** (as he then was) expressed himself as follows on preliminary objections:

“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... The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.....”

17. Accordingly, a preliminary objection is a point of law which does not require probing of evidence in order to be proved. What is the nature of the objections herein?

18. The objections were that: -

- 1. There is no privity of contract between the plaintiff and the 2nd Defendant as under Section 3 of the Law of Contract Act.**
- 2. The lease was never registered as provided under Section 47 of the Registered Land Act Cap 300 Laws of Kenya (now repealed) or Section 54 of the Land Registration Act 2012.**
- 3. Plot No. 813, Phase 8 Scheme Plan Number Nairobi/Block/82/187 was not approved by the Governor General Central Bank of Kenya under Section 8 of the Banking Act.**

19. Doubtless, the issue whether or not the lease was registered will require evidence to prove. This point is for trial. I agree with the trial court on her decision on that point. Similarly, whether the premises were approved by the Governor of Central Bank is also a matter of fact to be proved through evidence. Again, this is not a matter to be tried as a preliminary objection. The only issue but which deceptively looks like a straight-forward one is the claim that there is no privity of contract between the parties herein. But a careful consideration of the facts of this case reveals a merger of two companies and the formation of a new outfit, the Appellant which took over the assets and liabilities of the 2nd Respondent. Looking at the chronology of events of the merger which started in January 2010 up to the eventual licensing of the Appellant to carry out business of a financial institution on 24th August 2010, there will be need for evaluation of evidence to disentangle whether the lease agreement herein entered into on 30th April 2010 at a time when the Appellant had not commenced its business was for the benefit of the Appellant. It is worth to note that the lease was signed by a Director of the Appellant. These are intricate factual matters which require evaluation in a plenary hearing and may not be effectively and completely determined as preliminary objection. The Appellant as successor in title, remains a necessary party in the suit so as to enable the court to ‘effectually and completely adjudicate upon and settle all questions involved in the suit’. See **Order 1 Rule 10 of the Civil Procedure Rules**

20. The summary procedure designed for preliminary objections is severely restricted to only process clear points of law. Any attempt to squeeze such matters of facts loaded with heavy evidentiary textile through such summary procedure only serves an altogether different purpose-which is not in obedience to the constitutional command to serve substantive justice. The grounds of appeal as well as the issues formulated by the Appellant clearly require proper evaluation in a normal hearing. Those issues cannot be evaluated an interlocutory appeal such as this.

21. In light of my foregoing findings, the preliminary objection herein is not a true preliminary objection in the sense of the law. I am glad the trial magistrate was alive to this fact. As a consequence, I find this appeal to lack merit and is dismissed. However, I order each party to bear own costs of the appeal. The original file be remitted back to the trial court for hearing.

Dated and signed at Meru this 14th day of November 2019

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F. GIKONYO

JUDGE

Dated, signed and delivered in open court at Nairobi this 19th day of November 2019

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L. NJUGUNA

JUDGE