



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 60 OF 2016

SAYANI INVESTMENTS LIMITED.....APPELLANT

AND

DR. DAVID MOKAYA.....1ST RESPONDENT

MADUKA BOUTIQUE.....2ND RESPONDENT

BENON OMALE KUBE.....3RD RESPONDENT

PHYLIS WETANGULA.....4TH RESPONDENT

AND

SAMUEL MWANGI.....1ST INTERESTED PARTY

BEN KOGL.....2ND INTERESTED PARTY

JOHN KANG'ETHE.....3RD INTERESTED PARTY

PATRICK MWAU.....4TH INTERESTED PARTY

(an Appeal from the Judgment delivered by the Business Premises

Rent Tribunal of Kenya at Nairobi by Hon. Mbichi Mboroki, Chairman

on 22nd January, 2016 and the consequential Order issued in Business Premises Rent Tribunal case Nos. 971,972, 973 & 974 of 2012

RULING

The ruling herein relates to the preliminary objection dated the 16th day of July, 2019 and filed on the same date. It was raised by counsel for the respondent and the same is on the basis that this court does not have jurisdiction to hear and determine the appeal herein.

At the hearing of the same, counsel for the respondent submitted that the court has no jurisdiction to hear the appeal for the reason that an amendment was done to Cap 301 in Misc Amendment Act of 2015 dated the 15th December, 2015 which amended section 15 of the Act.

He submitted that pursuant to that amendment, the court has no jurisdiction to hear the appeal and in the circumstances, it cannot even make an order for transfer of the same.

Counsel for the interested party associated himself with the submissions made by counsel for the applicant/respondent to the effect that the court has no jurisdiction to hear or transfer the matter.

On his part, counsel for the appellant agreed that the court has no jurisdiction but averred that the preliminary objection has not sought any orders in terms of striking out or dismissal of the appeal. He urged the court to invoke its inherent jurisdiction under Section 3A, 1A, 1B coupled with Article 159 of the constitution and make orders for transfer of the appeal to the Environment and Land Court for hearing and determination. He has urged the court in the interest of justice, not to visit the mistake of counsel to the litigant.

In his rejoinder, counsel for the respondent submitted that it is not regular for counsel for the appellant to raise an application for transfer of the appeal as that ought to have been filed before the hearing of the preliminary objection, if at all. On the submission by counsel for the appellant that the preliminary objection has not sought any orders, it was his contention that the nature of a preliminary objection is that it is supposed to dispose of a matter and a party does not have to pray for a specific order to that effect.

The court has considered the preliminary objection and the submissions by the learned counsels for the respective parties. The essence of a preliminary objection was given by law J. A. Sir Charles Newbold P. in Mukisa Biscuits Manufacturing Co. Limited vs. West End Distributors (1969) EA 696 at page 700 where the court 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 on 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”

Sir Charles Newbold P. added as follows page 701;

“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 facts are to be ascertained or if what is sought is the exercise of judicial discretion”

The preliminary objection herein is on jurisdiction. In the celebrated case of Motor vehicle MV Lillan 5 vs. Caltex oil (Kenya) Limited (1989) KLR the court had this to say about jurisdiction;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision”.

The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by like manner. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the areas over which the jurisdiction shall extend; it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the exercise of a particular set of facts, the court or the tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists.

Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing. Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited and the moment a court determines that it has no jurisdiction it has to down its tools and proceed no further”

In the supreme court case of Samuel Kamau Macharia & Another vs. Kenya commercial Bank & 2 Others (Application No. 2 of 2011) (2012) eKLR the court pronounced itself on jurisdiction thus;

“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 the law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of a mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the matter of Interim Independent Electoral Commission (applicant) Constitutional application number 2 of 2011. Where the constitution exhaustively provides for the jurisdiction of a court of law the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the constitution. Where the constitution confers power 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”

Coming from that background, it is not in dispute that the appeal herein arises from the decision of Business Premises Rent Tribunal which is governed by the landlord and tenant (Shops, Hotels and Catering Establishments) Act Cap 301 Section 15(1) of the Act provides as follows;

“Any party to a reference aggrieved by any determination or order of a tribunal made therein may, within 30 days after the date of such determination or order, appeal to the Environment and land Court.”

This provision was introduced by way of an amendment to the Act vide Act no. 15 of 2015.

It is therefore clear that the jurisdiction to hear appeals from BPRT was taken away from the High Court to the Environment and land Court by that amendment.

The constitution of Kenya under 6th schedule provide;

“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this constitution or as directed by the chief justice or the Registrar of the High Court.

It is clear that the amendment to the Act was effected in the year 2015 and the appeal herein was filed in the year 2016 after the amendment, which therefore means, as at the time of filing the appeal the court did not have jurisdiction to hear the appeal.

The question that the court will have to determine is whether a matter filed in a court which does not have jurisdiction in the first place, can be transferred to a court with jurisdiction. This issue was discussed by the court of Appeal in civil appeal no. 244 of 2010 (Phoenix EA assurance Company Limited vs. S. M. Thiqa T/A news paper Services where the court held thus;

“It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; all orders emanating from the suit are null and void.”

The court in the case of Josiah M. R. Karuri vs. Simon Gichangi Kabugi Misc. Application Number 15/2012 at Nyeri while faced with a similar situation stated;

“Be that as it may, the guiding principle on jurisdiction still remains that a suit filed in a court without jurisdiction is a nullity ab initio and for that very reason it cannot be transferred to a court of competent jurisdiction because there is, in effect, nothing to transfer in the first place. It may be argued that this is a technicality which the court can properly ignore in the spirit of Article 159(2) (d) of the Constitution which implores the courts to administer justice without undue regard to procedural technicalities. I am however, hesitant to accept the argument whether or not a court is seized of jurisdiction to dispose of any particular matter is a question of technicality, procedure or otherwise. In my humble view, it is a question that goes to the very core of the courts authority; that is, it either has the authority to determine the suit before it or it does not. Where the latter is the case, the court cannot take any further step purporting to sanitize what in effect is a non-existent suit, all it can do is to declare it to be what it is a nullity.”

The same Principle was advanced in the famous case of Kagenyi v. Mucirambo (1968) E.A 43 that when a suit has been filed in a court without jurisdiction, it is a nullity.

In view of the foregoing, I find and hold that this court does not have jurisdiction to hear the appeal. Same is struck out but with no orders as to costs.

It is so ordered.

Dated, signed and delivered at NAIROBI this 11th day of December, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondents

..... for interested parties