



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 243 OF 2017

KENFREIGHT (E.A.) LIMITEDAPPELLANT

VERSUS

1. NIC BANK (K) LIMITED

2. IBERDROLA INGENIERIA Y CONSTRUCTION

SA UNIPERSONAL.....RESPONDENT

J U D G M E N T

1. By its plaint dated 26/09/2016 and filed in Court the same day, the Appellant sued the Respondent and ask the trial court to grant it two declarations and orders of permanent in injunction respect a demand for payment of some USD 134, 475 pursuant to a contract between the parties dated the 9/7/2014.

2. Simultaneous with the plaint the Appellant filed a Notice of Motion dated the same day by which the appellant sought restraining orders against the 1st defendant for paying to the 2nd defendant and the 2nd defendant from receiving any payment for the 1st defendant on account of the contract dated 9/7/2014. In the 3/10/2016 the court, Nyakweba (PM) granted to the Appellant interim *ex parte* orders in terms of prayer 2 pending the hearing interpartes.

3. When served with the papers the 2nd Respondent did not enter appearance but a Notice of Appointment of advocate and a Notice of Preliminary objection. The preliminary objection was couched in the following fashion:-

NOTICE OF PRELIMINARY OBJECTION

“TAKE NOTICE that the 2nd Defendant/Respondent will object to the hearing of the Plaintiffs/Applicant’s Notice of Motion Application dated 26th September 2016 on the following grounds, which shall be raised in *limine*.

1. THAT the value of the subject matter in these Proceedings is US\$ 134,475.00.

2. THAT this Honourable Court lacks the jurisdiction to make any orders or hear this suit pursuant to section 7(1) of the Magistrates’ Courts Act, 2015”.

4. When the parties appeared before the court; E. Nyakweba (PM) on the 17/10/2016 the court directed that the file be placed before the Chief Magistrate (J. Nangera CM) for directions as to hearing and disposal in view of the Preliminary Objection dated 17/10/2016.

5. The records read that when the parties appeared before the Chief Magistrate the Appellant opted to withdraw the application against the 2nd Respondent so as to proceed against the 1st Respondent who had been served but who had not attended nor filed any opposing papers.

6. The 1st defendant subsequently entered appearance and filed a statement of defence as well as Notice of Preliminary Objection dated 6/7/2017. Although the application for injunction was withdrawn against the 2nd defendant, the suit received infact. Therefore on the 11/7/2017 the court directed that the preliminary objection by the 1st defendant be heard prior to the suit. It was additionally directed that it be canvassed by way of written submissions. The submissions by the 1st defendant were filed on 1/09/2017 while those by the plaintiff were filed on the 12/09/2017.

7. The preliminary objection by the 1st defendant was fashioned thus:-

NOTICE OF PRELIMINARY OBJECTION

“TAKE NOTICE that the 1st Defendant will raise the following Preliminary Objection to the Notice of Motion dated 26/9/16 and the entire suit.

1. This Court does not have the pecuniary jurisdiction over the value of the subject matter being a Performance Bond for USD. 612,207.70.

8. When all relevant facts are put into perspective, the only question for determination by the court is whether or not the trial court was vested with the requisite pecuniary jurisdiction to entertain and determine the suit before it.

9. In their submissions before the trial court, the 1st Respondent had submitted that the subject matter of the suit and dispute was the sum of USD 612,207.70 which translates into some Kshs.61,220,770 or thereabout hence the court had no pecuniary jurisdiction to entertain and determine the matter.

10. To the contrary, the Appellant, as plaintiff before the trial court, had maintained that the dispute, and therefore cause of action, was about the sum of USD 134,475/=. Those submissions and positions taken on the preliminary objection asked of the court to find what was the subject matter of the dispute. After hearing the parties, the trial court held and delivered itself in the ruling dated 23/10/2017 as follows:-

“This case is in respect of the performance bond whose value is clearly above the limit of this courts jurisdiction. It is confirmed from the avoidance of doubt that this courts pecuniary jurisdiction does not exceed Kshs.20,000,000/=.

For the above reasons, I agree with the 1st defendant that this court is bereft of jurisdiction herein. The preliminary point is accordingly allowed with costs to the 1st defendant”.

11. In coming to that conclusion it is clear, even if the court did not say so, that it was convinced that the subject matter of the dispute was the 612,207.70 US Dollars and not the sum of USD 134,457.

12. The question of the subject matter of the suit need not be inferred from anywhere else beyond the pleadings filed. In this matter both sides filed respective pleadings. From those pleadings the court needs to establish what was asserted by the claimant and denied by the defendant to isolate the question it is mandated to resolve by this determination. Having relied the pleadings filed, I have come to the conclusion that the dispute is pleaded at paragraphs 10, 11, 12 & 16 where the plaintiff said:-

“Paragraph 10 : The Plaintiff avers that the Second Defendant has and continues to wrongfully fail, refuse and/or neglect to notify the First Defendant and confirm to it of the completion of the works under the Contract and has now threatened to make a claim for payment of a sum of US\$134,475.00 on account of alleged damages to the wind turbines from the First Defendant pursuant to the performance Bond when it very well knows it cannot do so. Save for notification of the occurrence of the alleged damage, the Plaintiff has todate not received any documentary evidence or survey reports nor other material from the Second Defendant to substantiate such claim.

Paragraph 11 : Despite its confirmation that the works which were the subject of the Contract were satisfactorily completed and concluded in terms of the Contract on 8th June 2015, the Second Defendant has now wrongjully, and in a bid to unjustly enrich itself, threatened to make a demand for payment under the aforesaid Bond for the sum of US\$134,475.00 unless the plaintiff renews the Performance Bond in the same terms and conditions as that earlier issued. The Plaintiff avers that in making such wrongful demands, the Second Defendant is conducting itself deceitfully and with mala fides and complete lack of candour.

Paragraph 12 : The Second Defendant’s demand is untenable and without any basis given that the Contract whose performance the Performance Bond issued by the First Defendant was intended to secure has already been concluded with a confirmation by the Second Defendant that the Plaintiff had discharged all its obligations in accordance with the terms and conditions thereof.

Paragraph 16 : The Plaintiff stands to suffer substantial loss and prejudice in the event the amount of US\$134,475.00 is paid out without any reason or basis and its cash flow will suffer adversely and cause a severe strain on the Company’s finances.

13. Based on such assertions, the plaintiff sought for prayer essentially resisting the payment by the plaintiff of a sum of USD 134,475 and no more. In the defence dated 2/2/2017 and filed in court a day before 01/02/2017, the 1st Respondent beyond denying the allegations by the plaintiff pleaded none-privity of contract sued upon, pleaded that he was wrongly and improperly joined to the suit then denied the jurisdiction of the court.

14. To this court the dispute before the trial court was whether or not the 2nd defendant could demand payment from the 1st and be paid by the said 1st defendant the sum of US 134,475. In reality the court would not be expected to pronounce itself on the value of the performance bound in the sum of 612,207.70 USD because no dispute was raised in the plaint on that sum. Whereas it is evident that the demand the 2nd defendant was being sued not to make could have had its foundation on the performance bond, the dispute between the parties had been

narrowed down to USD 134,475 and no more.

15. That being my finding it follows that when the trial court held that the claim was beyond its jurisdiction of Kshs.20,000,000, the court was overtly and obviously in error in its appreciation of what the dispute before him was all about. That is what the courts have said, **he took into account an irrelevant or immaterial matter and thereby arrived at a wrong decision**. When such happens this court as an appellate court is entitled to interfere [\[1\]](#).

16. This court when considering a similar appeal observed and said in ***African Marine & General Engineering vs Tanzania National Roads Agency (TANROADS & ANOTHER) [2016] eKLR***

“The question of performance of the contract of supply of ferries by the plaintiff, was with respect, not a cause of action or a complaint before the court and the court was not entitled to go into it. I say it was not before the court because no prayers were advanced in that regard”.

17. Those words would equally apply in this appeal and I say the question of guarantee by the 1st Respondent to the 2nd Respondent by the performance bond issued by the 1st defendant dated 11/9/2014 in aggregate sum of USD 612,207.70 was not in dispute before the trial court and was not therefore the subject matter for determination. The dispute was limited by the pleadings, filed at USD 134,475 (or Kshs.13,447,500) and no more.

18. That being the case and the trial court having correctly found that his jurisdiction extended to Kshs.20,000,000/= the trial court was undoubtedly in error to say it lacked jurisdiction to entertain the matter.

19. The consequence of that error is that the order thereby arrived at must be set aside and in its place be substituted an order disallowing the preliminary with the consequence that the struck out suit is hereby reinstated for hearing and disposal by any court with requisite jurisdiction including Mr .J. Nang’ea (CM) provided that Magistrate and the parties before him feel comfortable to handle the matter for the second time and after this determination.

20. In effect this appeal is allowed with costs to the Appellant to be paid by the 1st Respondent.

Dated and delivered at Mombasa on this 8th day of October 2018.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Kenfro Africa vs Lubia (No. 2) [1985] eKLR