



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 293 OF 2018

PBM NOMINEES LIMITED.....PLAINTIFF

=VERSUS=

UCHUMI SUPERMARKETS LIMITED.....DEFENDANT

RULING

1. The plaintiff brought this suit on 25/6/2018 claiming against the defendant rent arrears, service charge, and interest, together totaling Kshs 147,610,693.20 as at the time of initiating the suit. The plaintiff subsequently filed a notice of motion dated 18/7/2018 seeking summary judgment for the claimed sum, or in the alternative, judgment for the admitted sum of Kshs 61,304,565.60.

2. The defendant entered appearance on 11/7/2018 and filed a statement of defence dated 23/7/2018. In addition, the defendant filed a notice of preliminary objection dated 12/7/2018, objecting to this court's jurisdiction to adjudicate the dispute in this suit.

3. The court heard both the plaintiff's application and the defendant's preliminary objection, and reserved the matter for ruling on 5/2/2020. While the matter was pending ruling, the defendant brought a notice of motion dated 18/11/2019 seeking stay of all proceedings, rulings, judgments and/or orders in this suit, pending the hearing and determination of **Nairobi High Court Insolvency Petition No 25 of 2018**. The said notice of motion dated 18/11/2019 was disposed through this court's ruling rendered on 15/7/2020. What now falls for determination in this ruling are the defendant's preliminary objection dated 12/7/2018 and the plaintiff's application for summary judgment/judgment on admission dated 11/7/2018.

4. I will first dispose the Preliminary Objection because it raises the question of jurisdiction of this court to adjudicate the dispute in this suit. The import of the preliminary objection is that, should the court find that it does not have jurisdiction to handle this dispute, it will be obligated to down its tools without making any pronouncement on the notice of motion dated 18/7/2018. Indeed, the Court of Appeal emphasized this mandatory approach in **Owners of Motor Vehicle Lillian "S" v Caltex Oil (K) Ltd (1989) IKLR** in the following words:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending 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"

5. The tenor of the defendant's preliminary objection dated 12/7/2018 is that the Environment and Land Court lacks jurisdiction to adjudicate the dispute between the parties in this suit because the claim in this suit is a civil debt that lies squarely in the jurisdiction of the High Court pursuant to Article 163(3) of the Constitution of Kenya in line with the Court of Appeal decision at **Mombasa in Civil Appeal No 83 of 2016; Civil Appeal No 83 of 2016; Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others**.

6. Urging the court to uphold the preliminary objection, counsel for the defendant, through written submissions dated 14/10/2019, cited the decision of the Supreme Court of Kenya in **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 others (2012) eKLR** where the court held as follows:

"A court's jurisdiction flows from either the constitution or legislation or both. Thus a court 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. It cannot expand its Jurisdiction"

7. Counsel for the defendant argued that what is before court for determination is the deed of acknowledgment of debt agreement which is a contract between the parties in this suit and the same does not in any way involve the use and occupation of land. Relying on the Court of Appeal decision in the **Patrick Kangethe** case, counsel contended that the right court with jurisdiction to adjudicate the dispute in this suit is the High Court. Counsel urged the court to allow the preliminary objection.

8. On their part, the plaintiff through written submissions dated 16/7/2010, by M/s Macharia-Mwangi & Njeru Advocates, argued that this

court has jurisdiction to entertain this suit. Counsel cited the constitutional framework on jurisdiction under Article 162(2) (b) and Section 13 of the Environment and Land Court Act. Counsel submitted that Section 13 of the Act grants this court jurisdiction to deal with disputes relating to rents and enforceable interests in land. Counsel added that the defendant having denied the existence of a sub-lease between them and the plaintiff, this court is the proper court to determine that issue.

9. I have considered the tenor of the preliminary objection and the rival submissions on the preliminary objection. The single issue falling for determination in the preliminary objection is whether this court has jurisdiction to adjudicate the dispute in this suit.

10. Article 162(2) (b) of the Constitution of Kenya 2010 sets out the broad jurisdiction of this court in the following terms:

162. (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— (b) the environment and the use and occupation of, and title to, land.

11. Pursuant to the above constitutional framework, Parliament enacted the Environment and Land Court Act through which it elaborated, in finer details, the jurisdiction of the court as contemplated in Article 162(2)(b). Section 13 of the Environment and Land Court Act contains the following detailed jurisdiction of the Court:

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land. CAP. 12A Environment and Land Court [Rev. 2012] Environment and Land Court [Issue 1] E11 – 9

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs

12. There is common ground that at all material times, the plaintiff and the defendant had a tenancy relationship pursuant to a sub-lease. The plaintiff contends that the defendant breached the sub-lease in that they failed to pay rent. The plaintiff claims the said rent together with interest and service charge pursuant to the terms of the sub-lease.

13. In contending that this court does not have jurisdiction, the defendant relied on the Court of Appeal decision in **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others (2017) eKLR**. The dispute in the Kangethe case revolved around the question as to whether or not this court had jurisdiction to adjudicate a mortgage dispute. Rendering itself on that question, the Court of Appeal in the Kangethe case stated as follows:

“Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to “use” of land as discussed herein above. Such contracts, in our view, ought to be incidental to the “use of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court”

14. About two years after the Kangethe decision, the Court of Appeal was confronted with an appeal in **Nakumatt Holdings Limited & Another v Ideal Locations Limited (2019) eKLR** whose factual background was exactly the same as the factual background of the present suit. The Court of Appeal rendered itself on the question of jurisdiction of this Court in relation to a claim for a claim as follows:

“29. In rejecting the contention that the ELC did not have jurisdiction, the Judge stated that it was not contested that the dispute between the parties stemmed from a landlord and tenant relationship in which the landlord claimed that Nakumatt had breached the terms of the lease agreement by defaulting in the payment of rent, service charge and promotion fund. The Judge expressed that the ELC was established under Section 4 of the ELC Act enacted pursuant to Article 162(2) of the Constitution; that under Article 162(2) of the Constitution and Section 13 of that Act, the ELC has exclusive jurisdiction to hear and determine disputes relating to the use and occupation of and title to land; that under Article 165(5) of the Constitution, the High Court is prevented, in express terms, from exercising jurisdiction in matters reserved for the ELC. The learned Judge held that the Constitution does not prohibit the ELC from hearing a dispute over use and occupation of land where there is a pending insolvency cause involving one of the parties. Being satisfied that the dispute related to use and occupation of land, the Judge concluded:

“...under Article 162(2)(b) of the Constitution and Section 13(2)(a) of the Environment and Land Court Act, this Court has jurisdiction to hear the suit and the application and issue the orders sought by the plaintiff. In my view, the plaintiff’s action does not in any way contravene Section 430 of the Insolvency Act as the Plaintiff in this case is not undertaking or seeking to undertake any of the actions listed in Section 430. The plaintiff has not taken any action against the assets of the 1st defendant, whether attachment, sequestration, distress or execution. The plaintiff is only seeking to exercise its rights to peaceable re-entry which in my view, is not prohibited by Section 430 of the Insolvency Act.”

30. *Given the background to the matter as set out above, there can be no doubt that the subject matter of the suit, and the cause of action arose from the sub-lease over L.R. No. 14407 and 16088 under which the landlord leased a portion of those premises to Nakumatt.*

That, as the learned Judge correctly concluded, is a matter within the class of “use and occupation” of land under Article 162(2) of the Constitution and therefore within the jurisdiction of the ELC under Section 13 of the ELC Act. Under Article 162(2) of the Constitution, Parliament was empowered to “establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land” and to “determine the jurisdiction and functions of such Courts”. Pursuant thereto, Parliament enacted the Environment and Land Court Act. Section 13(1) of that Act outlines the jurisdiction of the ELC as follows:

“(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court [the ELC] shall have power to hear and determine disputes-

(a) relating to environmental planning and protection, climate issues, land use, planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.”

31. *Given those provisions, we are fully in agreement with the learned Judge that the dispute between the parties, stemming as it*

did, from the sub lease over the leased premises over L.R. No. 14407 and 16088, is a matter falling within the jurisdiction of the ELC.

15. The Court of Appeal held in **Trans World Safaris Kenya Limited v Somack Travel Limited [1997] eKLR** that where there are conflicting authorities on an issue, the court is required to properly direct its mind and decide which of the conflicting decisions to follow.

16. This court has observed that the facts in the Nakumatt Holdings Limited case were exactly the same as the facts of the dispute in the present case. Like in the present case, the plaintiff in the Nakumatt Case alleged breach of lease and claimed unpaid rent. Similarly, the defendant company was the subject of insolvency proceedings. On the other hand, the dispute in the Kangethe case revolved around mortgage and the key question in the Kangethe case was whether the ELC had jurisdiction to deal with disputes relating to mortgage. I would, in the circumstances, follow the decision of the Court of Appeal in the Nakumatt Holdings Case.

17. Secondly, the contract which the plaintiff in this suit alleges was breached by the defendant related to “use” of land because the material contract was a lease. Even if I were to apply the criteria set in the **Kangethe case** in interpretation of Section 13 of the ELC Act, I would still hold that this court has jurisdiction because the claim in this suit relates to breach of a lease.

18. In light of the above reasons, and guided by the Court of Appeal decision in **Nakumatt Holdings Limited v Ideal Locations Limited [2019] eKLR**, I find that this court has jurisdiction to adjudicate the dispute in this suit. The defendant’s preliminary objection is therefore dismissed. The plaintiff shall have costs of the preliminary objection. I now turn to the notice of motion dated 18/7/2018.

Notice of Motion dated 18/7/2018

19. Through the notice of motion dated 18/7/2018, the plaintiff seeks the following orders;

(a) That judgment be entered for the plaintiff against the defendant for the sum of Kshs147,610,693.20 as prayed in the plaint.

Alternatively

(b) That judgment be entered for the plaintiff against the defendant for the admitted sum of Kshs 61,304,563.60 and the rest of the plaintiff’s claim to proceed to trial.

2. That costs of the application be awarded to the plaintiff/applicant

20. The motion was premised on the grounds, *inter-alia*, that the defendant had not filed a defence to the claim and that the defendant had, through previous documentation including letters dated 25/4/2018 and 8/5/2018, admitted owing to the plaintiff an amount of Kshs 61,304,565.60.

21. The application was supported by an affidavit sworn on 18/7/2018 by Atul Shah. Annexed to the affidavit were copies of (i) Sub-lease dated 25/11/2015; (ii) Deed of acknowledgment of Debt, Agreement to settle Arrears and Agreement for Surrender dated 20/10/2017; and (iii) Letters dated 25/4/2018 and 8/5/2018.

22. In response, the defendant filed grounds of opposition dated 2/11/2018 and a replying affidavit sworn on 22/8/2018 by Judith Matata. The case of the defendant was that the defendant filed a defence to the suit herein within the prescribed time. The defendant added that the letters which the plaintiff was relying on were issued on a “without prejudice” basis and cannot form the basis of the present application. The defendant urged the court to allow it its day in court.

23. The motion was canvassed through written submissions filed on 17/7/2019 by the plaintiff’s advocates M/s Macharia –Mwangi & Njeru Advocates. Counsel for the plaintiff submitted that the plaintiff had exhibited a sub-lease dated 25/11/2015. He added that in the recital part of the Deed dated 20/12/2017, the defendant acknowledged that it owed the plaintiff the sum of Kshs 139,703,163.20 an account of rent arrears, unpaid service charge, unpaid electricity and water bills, and accrued interest as at 1/12/2017. Counsel further submitted that the defendant had expressly admitted owing the plaintiff the sum of Kshs 61,304,565.60. Counsel added that there was nothing in the two letters relied on by the plaintiff to suggest that they were “without prejudice” correspondence. Counsel relied on the following decisions in urging the court to grant the prayers in the motion: (i) **Guardian Bank Limited v Jambo Biscuits Kenya Limited [2014] eKLR**; (ii) **Ideal Ceramics Ltd v Suraya property Group LTD; Nairobi HCCC Number 408 of 2016**; and (iii) **Kenya Commercial Bank Limited & Another v Suntra Investment Bank Limited [2014] eKLR**.

24. The defendant opposed the motion through written submissions filed on 17/10/2019 by M/s Wambugu & Muriuki Advocates. Counsel for the defendant identified the following as the three issues falling for determination in the motion dated 18/7/2018: (i) whether privileged conversation can be used as a basis for seeking summary judgment; (ii) whether the circumstances of the case permit the defendant to be denied an inalienable right to be heard; and (iii) whether the prayers sought ought to be allowed.

25. Counsel submitted that all communications that the plaintiff was relying on as admissions were made on a without prejudice basis for the purpose of settling the dispute between the parties and were therefore privileged. Counsel urged the court to guard jealously the privilege enjoyed by communications made on without prejudice basis.

26. Counsel for the defendant further submitted that Article 50(1) grants the defendant an inalienable right to be heard before judgment is entered against them. Counsel argued that the present application sought to limit the right of the defendant to have his case heard by an independent tribunal. Counsel contended that the disparity between the figure in the principal prayer and the figure in the alternative prayer

was a proper basis for the court to find the need for a full trial. Counsel argued that the plaintiff had not satisfied the criteria for summary judgment or judgment on admission.

27. I have considered the application, the evidential materials, the defendant's response, the rival submissions, the relevant legal framework, and the jurisprudence relevant to the key question in the application. The key question in the application is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant summary judgment or judgment on admission.

28. The principle upon which our courts exercise jurisdiction to grant summary judgment are well settled. The Court of Appeal summarized that principle in **Isaac Awuondo v Surgipharm Limited & Another [2011] eKLR** in the following words:

“ Summary judgment is a drastic remedy which may be granted in clearest of cases in which there is no bona fide defence to the plaintiff's claim”

29. Secondly, it is a settled principle of our civil procedure law that the remedy of summary procedure through summary judgment or judgment on admission is intended to ensure that a party whose entitlement is evidently due or admitted does not wait for full trial by the court, of a non-existent question. The rationale behind this principle is that, it is undesirable to litigate when there is no question or issue of fact or law to warrant trial.

30. Thirdly, the court's jurisdiction to grant judgment on admission is exercised only in cases where the admission, whether express or implied, is plain, clear, unconditional, obvious and unambiguous.

31. In the application under consideration, it is admitted that there was a sublease between the parties to this suit. The defendant filed grounds of opposition and a replying affidavit. The replying affidavit did not have any annexure. Secondly, the defendant did not dispute the fact that the Deed of Acknowledgment of Debt, Agreement to Settle Areams and Agreement for Surrender of Lease in the event of default, dated 201/12/2017 (the Deed), was duly executed and bound the parties thereto. Thirdly, the defendant did not dispute the fact that through its advocates, it wrote the two letters dated 25/4/2018 and 18/8/2018 acknowledging the debt of Kshs 61,304,565.60 and committing themselves to pay the debt.

32. Under the Deed, the defendant acknowledged owing the plaintiff sums amounting to Kshs 139,703,163.20. On their part, the plaintiff agreed to discount the debt by 50%, bringing the debt to Kshs 69,851,581.60. Further, the defendant agreed to unconditionally and with immediate effect surrender and relinquish its right to occupy Phase 3 of the Upper Market Area.

33. The plaintiff having placed before the court the Deed together with the above letters, the defendant had a duty to demonstrate that either the money was subsequently duly paid or cannot be paid on specific lawful grounds. They have not done that.

34. The principal prayer in the motion was summary judgment for Kshs 147,610,693.20. At this point, it is not clear from the evidence before court how the figure of Kshs 147,610,693.20 was arrived at. Secondly it is apparent from the Deed that part of the consideration for the 50% discount on the debt was the defendant's surrender of the lease. Whether there was surrender or not and whether or not the 50% discount still stands requires ascertainment through a trial. What is clear from the evidential materials before court is that, as at 25/4/2018, there was a duly acknowledged and admitted debt of Kshs 61,304,565.60 owed to the plaintiff by the defendant. There is no evidence that the said acknowledged debt has since been paid.

35. The defendant contended that the letters dated 25/4/2018 and 8/5/2018 were without prejudice correspondence and were therefore privileged communication, and could not be construed to constitute an admission. That contention, in my view, is without basis. Neither of the two letters bears any “without prejudice” endorsement. None of them contains anything within their respective texts to suggest that the content therein was made on a “without prejudice” basis. I do not therefore see the basis for the contention that they were “without prejudice” correspondence. I therefore reject the defendant's argument on the above grounds.

36. In light of the foregoing, it is the finding of this court that the plaintiff has not satisfied the court on the principal prayer relating to summary judgment for Kshs 147,610,693.20. Further, it is the finding of the court that the plaintiff has properly satisfied the court on the alternative prayer for judgment on admission for Kshs 61,304,565.60.

Disposal Orders

37. Consequently, I make the following disposal orders in relation to the plaintiff's notice of motion dated 18/7/2018 and the defendant's preliminary objection dated 12/7/2018.

- a) The defendant's preliminary objection dated 12/7/2018 is dismissed for lack of merit***
- b) Judgment on admission is hereby entered for the plaintiff against the defendant for the sum of Kshs 61,304,565.60***
- c) The rest of the plaintiff's claim shall proceed to trial***
- d) The plaintiff has leave to forthwith enforce the judgment under order (b) above.***
- e) The plaintiff shall have costs of the preliminary objection and the notice of motion dated 18/7/2018.***

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27 DAY OF JULY 2020

B M EBOSO

JUDGE

In the presence of: -

Mr Eredi for the Defendant

Court Clerk - June Nafula