



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO. 33 OF 2019

SPIRE BANK LIMITED.....APPELLANT

VERSUS

EMERGING INVESTMENTS LIMITEDRESPONDENT

(Being an appeal from an order of the Chief Magistrate's Court at Nakuru of Hon. J B Kalo, Chief Magistrate delivered on 16th April 2019 in Nakuru CMCC No.1192 of 2018).

J U D G M E N T

1. The instant appeal is against the ruling delivered by the Hon. J B Kalo (Mr.) Chief Magistrate on 16th April 2019 in Nakuru CMCC No.1192 of 2018 on a preliminary objection taken by the Defendant, the present Respondent in the appeal. The Respondent had objected that the Chief Magistrate's Court lacked the pecuniary jurisdiction to handle the matter; that the offer letter/agreement relied on by the Appellant to found the suit did not comply with Section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya and hence the suit was fatally defective; and further that the institution of the suit was not duly authorized by way of a resolution by the plaintiff/appellant as required under the law. The learned Chief Magistrate upheld the preliminary objection holding that the Court lacked the pecuniary jurisdiction to deal with the matter and proceeded to strike out the suit with costs to the respondent.

2. The Appellant challenged the holding and finding of the trial Magistrate on the grounds set out in the memorandum of Appeal as hereunder:-

1. That learned trial magistrate erred in fact and law by allowing the Respondent's Preliminary objection challenging the Court's pecuniary jurisdiction when the Court had jurisdiction to hear and determine the suit.

2. The learned trial magistrate erred in fact and law by failing to appreciate that Section 7(1) (b) of the Magistrates Court Act No. 26 of 2015 did not apply in the instant case as the plaintiff sought an order of specific performance which is an equitable remedy thus not a liquidated claim to be quantified in monetary terms.

3. The learned Magistrate erred in law and fact by failing to recognize that the appellant's cause of action is wholly premised on the letter of offer which is essentially an agreement to agree. Parties had not entered into and executed the lease.

4. The learned Magistrate erred in law and fact by construing the subject value as the monthly rent payable (Ksh600,000/=) multiplied by the proposed term of the lease (6) years) to arrive at the figure of Kshs 28 million, when parties had not entered into and executed the lease.

5. The court erred in law and fact by failing to stick to the parties' pleadings and ended up importing a figure that had not been pleaded by either of the parties as the value of the subject matter.

3. The Appellant sought an order allowing the appeal and hence the setting aside of the lower Court's order striking out the suit and the remission of the suit to the Chief Magistrate's Court for hearing and determination on its merits.

4. The Respondent upon being served the Memorandum of Appeal on 21st May 2019 filed Grounds of Affirmation of the Ruling of the Hon B. Kalo Chief Magistrate Delivered on the 16th April 2019 as follows:-

1. That the Suit and application as filed is not an enforceable action as the contract and/or letter of offer relates to a question of disposition of an interest in land and the said contract and/or letter of offer did not comply with the provisions of section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya as read together with section 38(1) of the Land Act, no.6 of 2012.

5. The Appeal was argued by the parties by way of written submissions. The Appellant filed their submissions on 28th July 2020 while the respondent filed theirs on 5th October 2020. The suit in the Lower Court was decided upon at an interlocutory stage when the respondent raised the issue of the Court's jurisdiction to determine the matter and the competency of the suit in view of the provisions of section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya. While the learned Chief Magistrate made his determination on the basis of the Court lacking the pecuniary jurisdiction to handle the matter, he did not pronounce himself on the effect of Section 3(3) of the Law of Contract Act in regard to the letter of offer the Appellant was relying on to found the suit. I presume it is on that account the Respondent had filed grounds on which the learned Magistrate's Ruling ought to be affirmed. The Respondent's contention is that the letter of offer concerned a dealing of a disposition of an interest in land which under Section 3 (3) of the Law of Contract Act was required to be in writing and to be signed by all the parties and the signatures thereof to be attested by a person who was present at the time of signing.

6. The instant Appeal arises from a ruling rendered on a preliminary objection taken by the respondent before the lower court. An appeal does not lie as of right from a ruling decision given on a preliminary objection. Preliminary objections are not specifically provided for under the Civil Procedure Act and/or the Rules made thereunder. Preliminary objections relate to points of law which are argued on the basis that the facts are not in contestation. See the case of *Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors ltd (1969) EA 696* where the Court of Appeal as per Sir Charles Newbold, P. stated thus :-

“ – 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 had to be ascertained or if what is sought is the exercise of judicial discretion”

7. Before the learned Chief Magistrate the Respondent had challenged the Court's jurisdiction and had challenged the competency of the suit in view of section 3 (3) of the Law of Contract Act, which it was alleged had been contravened. These were clear points of law that could be argued as preliminary objections. The learned Trial Magistrate having considered the preliminary objection and rendered a ruling, the Appellant did not have an automatic right of appeal against the ruling and required in terms of Section 75 of the Civil Procedure Act, Cap 21 Laws of Kenya to obtain leave to appeal against the ruling. Section 75 (1) of the Civil Procedure Act outlines the Appeals from Orders that can be made as of right and under section 75 (I) (h) provides that appeals would lie without leave from any order made under the rules from which an appeal is expressly allowed by the rules. I set out hereunder section 75 (1) of the Civil Procedure Act for ease of reference.

Orders from which appeal lies

An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted—

- 1 (a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;
- (b) an order on an award stated in the form of a special case;
- (c) an order modifying or correcting an award;
- (d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- (e) an order filing or refusing to file an award in an arbitration without the intervention of the court;
- (f) an order under [section 64](#);
- (g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- (h) any order made under rules from which an appeal is expressly allowed by rules.

8. Order 43(1) of the Civil Procedure Rules provides the Orders and Rules from which an appeal would lie as of right and states thus:-

- (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75(1)(h) of the Act—
- (2) An appeal shall lie with the leave of the court from any other order made under these Rules.
- (3) An application for leave to appeal under section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.

9. A preliminary objection is not brought under any order or rule of the Civil Procedure Rules from which an appeal lies as of right and therefore a party who wishes to appeal against any order emanating from a ruling made pursuant to a preliminary objection must seek and obtain the leave of the Court to appeal. A party has the option at the time the order is made to make an oral application for leave to appeal against the order and/or to make a formal application for leave which must be made within 14 days from the date the order sought to be appealed was made.

11. In the appeal before the court, the appellant from the record did not seek the leave of the court to appeal against the ruling upholding the preliminary objection. The record only shows the Court *suo moto* granted stay of execution for 14 days. Both Advocates for the Appellant

and the Respondent were present on 16th April 2019 when the ruling was delivered. Although the competency of the appeal was not a ground of appeal, I am of the view that the issue is one that goes to the jurisdiction of the Court to entertain the appeal. The issue of the jurisdiction of the Court can be raised at any stage and the same need not be raised by the parties themselves. The Court can take up a jurisdictional issue and rule on it. The jurisdiction of the court is fundamental because if the court has no jurisdiction it has no business dealing with the matter. It ought simply to down its tools. Nyarangi, JA in the case of the *Owners of the Motor vessel "LillianS" –vs- Caltex oil (Kenya) Ltd (1989) eKLR* put it succinctly thus:-

“ Jurisdiction is everything. Without it a Court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of the proceedings pending other evidence. A court of Law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. Having considered the provisions of section 75(1) of the Civil Procedure Act and order 43 Rules 1, 2 and 3 of the Civil Procedure Rules I am persuaded the appellant herein could only prefer an appeal from the ruling of the learned Chief Magistrate on the preliminary objection with the leave of the court. As no leave to appeal was sought and/or granted by the Court, the appeal filed was incompetent and was an abuse of the Court process. The court lacks the jurisdiction to entertain it and the appeal is therefore unsustainable. The Appeal is accordingly dismissed with costs to the Respondent.

Judgment dated signed and delivered at Nakuru virtually this 29th day of October 2020.

J M MUTUNGI

JUDGE