Mutua t/a Eastern Kenya Auctioneers & another v Nzioki (Civil Miscellaneous Application E023 of 2024) [2024] KEMC 26 (KLR) (8 August 2024) (Ruling)

Neutral citation: [2024] KEMC 26 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL MISCELLANEOUS APPLICATION E023 OF 2024

CN ONDIEKI, PM

AUGUST 8, 2024

BETWEEN

JOSEPHAT MUSILA MUTUA T/A EASTERN KENYA AUCTIONEERS ..... APPLICANT

AND

GEDION KAVITA MUOKA ..... LANDLORD

AND

FLORENCE NZIOKI ..... RESPONDENT

RULING

Part i: The Applicant's Case

1. On 7th May 2024, the Applicant approached this Court vide a Chamber Summons Ex Parte of even dated primarily seeking an order for police assistance to the Applicant in breaking and carting away wares belonging to the Respondent in the rented premises belonging to the landlord herein namely Plot Number 40 located in Mitaboni with a view of levying distress for rent arrears in the sum of Kshs. 512,508 plus the auctioneers charges.

2. in this regard, the Applicant prayed that the Officer Commanding Mitaboni Police Station be ordered to oversee the exercise.

3. The Application is predicated on the grounds set out on the face of the Summons and the Supporting Affidavit.

4. in the Summons, it is averred that the tenant is in arrears of Kshs. 512,508 and she has refused to open the door for purposes of levying distress for the said rent arrears and that the landlord continues to suffer losses and it may be impossible to recover the arrears if left unabated.

5. in the said Supporting Affidavit, the substance of the Summons is rehashed. in addition, it is deposed that on 18th March 2024, the Applicant proclaimed the Respondent's goods and upon expiry of the 14 days distress notice, the Applicant went back to the premises on 2nd April 2024 at around 12 pm to cart away the goods but he found the premises securely locked. The Applicant deposes that he made another attempt on 12th April 2024 at around 11 am and he again found it securely locked. The Applicant deposes that several other attempts were made between 25th and 30th April with no success. it is thus deposed that the locking of the premises is intended to defeat the levy for distress.

6. The Applicant has exhibited: a copy of the Applicant's class B licence marked JMM1; a copy of the letter of instruction marked JMM2; and a copy of the proclamation dated 18th March 2024 marked JMM3.

7. Although the law permits such Applications to be disposed ex parte, in exercise of the discretionary power of this Court, this Court deemed it prudent to serve the Application to enable the Court dispose this Application inter partes.

Part ii: The Respondents' Case

8. The Application is opposed by the Respondent. In her Replying Affidavit dated 23rd May 2024, she states that her correct name is Florence Loko Nzuki and not Florence Nzioki as claimed by the Applicant. The Respondent admitted that she operates a business in the name and style of café lieu Hotel and Bakery Limited in the business premise of the said landlord.

9. However, the Respondent disputed the amount of the arrears owing, reasoning that since the monthly rent is Kshs. 4,000, it is impossible for her to accumulate arrears in the sum of Kshs. 512,508. The Respondent deposes that there has been a dispute as to the correct sum owing and the landlord has failed to properly justify the quantum of the arrears. It is deposed that the reason for closure of the business was because of disconnection of electricity on account of an unjustifiable bill of Kshs. 465,508.03 which has not been resolved.

10. The Respondent has exhibited: a copy of her identity card; a copy of letter addressed to Kenya Power and Lighting Company disputing a bill of Kshs. 465,508.03; and monthly billing statement marked FLM 1-3.

11. Further, the Respondent raised a preliminary objection on grounds that this Court lacks jurisdiction to determine the dispute.

Part iii: Submissions

12. Both parties filed written submissions.

Part iv: Points For Determination

13. Gleaning from the Chamber Summons Ex Parte; the Replying Affidavit; and the rival submissions, two questions commend themselves for determination as follows:

    i. Whether this Court has jurisdiction to determine the issues raised by the Respondent.

    ii. Whether this Application has met the test for grant of an order of police assistance.

Part v: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination

14. This Court now embarks on analysis and determination of each of the two issues in turn.

(i) Whether this Court has jurisdiction to determine the issues raised by the Respondent

15. Without doubt, the Respondent has raised weighty issues in her response namely the precise quantum of rent arrears and the question of the electricity bill of Kshs. 465,508.03 which was demanded by the service provider namely Kenya Power and Lighting Company Limited, and which was lumped up with the rent arrears demanded by the landlord.

16. There is no universally accepted definition of jurisdiction. Broadly speaking, jurisdiction is the authority or power granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. In the context of Kenya, jurisdiction of a Court is the authority or power granted to a Court to admit, consider and determine a legal matter on an area of responsibility defined by the *Constitution* and/or Act of Parliament and more particularly, the power reposed in a Court to interpret and apply the laws contemplated by Article 2 of the *Constitution* of Kenya and those set out under section 3 of the *Judicature Act*. See the locus classicus on this subject namely the Court of Appeal decision in *Owners of Motor Vessel "Lillian S" v. Caltex Oil (K) Ltd [*1989] KLR 1, per Nyarangi, JA. Article 2(2) of the *Constitution* provides that no person may claim or exercise State authority except as authorized under the *Constitution*.

17. It's now an entrenched edict, well-settled I must add, that first, jurisdiction is everything and second, a Court of law can only hear and determine that which is within the its domain, as circumscribed by the *Constitution* or Statute or both. The designers of this edict were justified by well-founded fears, chief among them being that authority -except when circumscribed- is inherently corruptive and a Court may fall into the temptation of becoming what Lord Mersey once described in his riveting analogy as "an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be." See G & C Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd (1913).

18. Since Jurisdiction is everything, the Court must inquire into its jurisdiction before Judgement is rendered. Without it, a Court has no power to make one more step and should instead down tools in respect of the matter before it, the moment it holds the view that it lacks it. See the said *Owners of Motor Vessel "Lillian S"* case.

19. Jurisdiction is not a mere procedural technicality. It flows from either the *Constitution* or legislation or both. See the Supreme Court decisions in *Samuel Kamau Macharia v. Kenya Commercial Bank Ltd & 2 Others [2012]* eKLR; and In the Matter of Interim Independent Electoral Commission [2011] eKLR.

20. In the foregoing context, Courts and other public bodies should work within the powers expressly conferred either by statute or legislation of both, but not by implication. Power should not be expanded through judicial craft. See *Geoffrey K. Sang v. Director of Public Prosecutions & 4 others* [2020] eKLR, per Odunga, J.; *Chogley v. The East African Bakery* [1953] 26 KLR 31 at 33 and 34; *Re: Hebtulla Properties Ltd.* [1979] KLR 96; [1976-80] 1 KLR 1195; *Warburton v. Loveland* [1831] 2 DOW & CL. (HL) at 489; *Lall v. Jeypee Investments Ltd* [1972] EA 512 at 516; *Attorney General v. Prince Augustus of Hanover* [1957] AC 436 AT 461; *Republic v. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [*2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

21. Article 162 of the *Constitution* enshrines the system of Courts in Kenya. Article 162(4) of the *Constitution* provides that subordinate Courts are the Courts established under article 169 of the *Constitution* or alternatively, those Courts established by Parliament in accordance with Article 169.

22. Article 169 sets out the subordinate Courts referred to in Article 162(4) thereof. In particular, Article 169(1) (a) establishes Magistrates Courts. Unlike superior Courts whose jurisdiction is primarily set out in the *Constitution* and other ancillary jurisdiction found in legislation like the *Judicature Act*, in the case of Magistrates' Courts, the *Constitution* has donated the power to define the jurisdiction thereof to Parliament Courtesy of Article 169(2) thereof.

23. In line with the command of Article 169(2) of the *Constitution*, Parliament repealed the *Magistrates' Courts Act*, Cap 10 of the Laws of Kenya in 2015 and re-enacted it as the *Magistrates' Courts Act*, 2015. In the said re-enacted Act, the Preamble reads thus "AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of the *Constitution*; to confer jurisdiction, functions and powers on the Magistrates' Courts; to provide for the procedure of the Magistrates' Courts, and for connected purposes". The pre-amble clearly indicates that the enactment is to actualize among other intentions, the command of the *Constitution* contained in Article 169 (2) of the *Constitution*. It is in line with that command that Parliament housed the jurisdiction of Magistrates' Courts. Categorically, sections 6, 7, 8, 9 and 10 of the *Magistrates' Courts Act*, 2015 is dedicated to the jurisdiction of Magistrates. Section 6 provides for the criminal jurisdiction of Magistrates' Courts; section 7 provides for civil jurisdiction of the said Courts; section 8 provides for claims relating to violation of human rights jurisdiction of the said Courts; section 9 provides jurisdiction on labour, employment, environment and land; and finally, section 10 provides for jurisdiction to punish for contempt of Court.

24. Regarding the first twin question of the precise quantum of rent arrears, no doubt, the nature of the tenant in this case falls within the Land and Tenants (Shops, Hotels and Catering Establishments) Act, Cap 301 of the Laws of Kenya. The circumstances of the tenancy bring within the controlled tenancy within the meaning assigned thereto by section 2(1) of the Act. Although a magistrate Court has secondary jurisdiction to hear and determine disputes over rent, the jurisdiction is deployed in circumstances outside controlled tenancy. Faced with a similar question in *Mjad Investment Limited & another v. Fujita Corporation Kenya Branch* (Environment & Land Case 71 of 2022) [2023] KKEELC 16376 (KLR) (7 March 2023), the Court ruled that "It is my own view that the position now is clear. And the position is that while this Court has general jurisdiction to handle matters relating to tenancy, the first port of call where the tenancy in question is controlled one, is a tribunal set up under the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Chapter 301 "

25. In this connection, the doctrine of exhaustion of remedies is germane. This doctrine posits that in circumstances where an alternative remedy is provided by law, it is should be strictly followed. This doctrine, therefore, expects that the BPRT be given a chance to dispose the Reference and the decision will then be amenable to either appeal or judicial review. See the Court of Appeal decision in *R v. National Environmental Management Authority* [2011] eKLR and the Supreme Court of Kenya (SCORK) decisions in *NGOs Co-ordination Board v. EG & 4 others; Katiba Institute (Amicus Curiae)* [2023] KESC 17 (KLR); and *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v. Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR. In the latter case, the SCORK expressed the following judicial view: "[118] ... Even where superior Courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi- judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute."

26. It follows that this dispute falls under the jurisdiction of the Business Premises Rent Tribunal as the first port of call.

27. Regarding the second twin question, Whenever a dispute arises between the licencee and consumer of electrical energy arising from discontinuation of supply of electrical energy on account of failure to pay charges for consumption, the first port of call in resolution of the dispute is the internal complaint handling and dispute resolution mechanism established by the licensee and approved by the Energy and Petroleum Regulatory Authority, as contemplated by the *Energy Act*, 2019. See the proviso to section 160(1)(a) which provides that "(1) A licensee shall not, except for reasons beyond the licensee's control, reduce, discontinue or refuse the supply of electrical energy to any consumer, unless— (a) the consumer has failed to pay charges for consumption of electrical energy or instalments relating to deferred connection costs, whether such charges are due to the licensee for the supply of electrical energy to premises in respect of which such supply is demanded or in respect of other premises: Provided that such charges have not been referred to the licensee by the consumer for resolution in accordance with the licensee's complaint handling and dispute resolution procedures approved by the Authority." Gleaning from the material placed before this Court, this mechanism was clearly utilized by the Defendant herein. A cursory visit of the Kenya Power website reveals - presumably in conformity with this requirement – that it has developed a "Customer Complaints Handling Guide" whose purview covers four types of broad complaints namely power interruption; pre-paid complaints; new connections; and billing for post-paid (the focus of the Defendant's complaint). A further examination of the Guide reveals that the Guide has essential provisions including service level timelines.

28. The second dispute resolution mechanism available to the consumer of electric energy is the Energy and Petroleum Regulatory Authority. See section 10 of the *Energy Act*, 2019 which sets out the functions of the Authority; section 11 thereof which postulates the powers of the Authority and section 160(3) which is directly applies to the present situation on the forum for resolution of a dispute arising from charges for consumption of electric energy. For clarity, I deem it fit to recapitulate section 160(3) thereof and it reads: "(3) If any dispute arises as to— (a) any charges; (b) the Application of any deposit; (c) any illegal or improper use of electrical energy; (d) any alleged defects in any apparatus or protective devices; or (e) any unsuitable apparatus or protective devices, it shall be referred to the Authority."

29. And if an aggrieved party is desirous of proffering an appeal against the decision of the Authority, section 25 of the *Energy Act*, 2019, establishes the Energy and Petroleum Tribunal as the proper forum for disposal of such appeals. Specifically, read section 25 together with section 36(4) thereof. I also deem it necessary to reproduce - in extenso - the provisions of section 36, which houses the jurisdiction of the Tribunal in the following terms: "(1) The Tribunal shall have jurisdiction to hear and determine all matters referred to it, relating to the energy and petroleum sector arising under this Act or any other Act. (2) The jurisdiction of the Tribunal shall not include the trial of any criminal offence. (3) The Tribunal shall have original civil jurisdiction on any dispute between a licensee and a third party or between licensees. (4) The Tribunal shall have appellate jurisdiction over the decisions of the Authority and any licensing authority and in exercise of its functions may refer any matter back to the Authority or any licensing authority for re-consideration. (5) The Tribunal shall have power to grant equitable reliefs including but not limited to injunctions, penalties, damages, specific performance. (6) The Tribunal shall hear and determine matters referred to it expeditiously."

30. And if any person is aggrieved with the decision of the Tribunal, then the party can either seek review thereof before the Tribunal or lodge an appeal at the High Court High Court. See section 37 of the *Act*.

31. However, considering the nature of the issue raised by the Respondent, it's without difficulty that this Court reaches a conclusion that the jurisdiction to hear and determine a dispute relating to charges for consumption of electrical energy, initially lies with internal dispute resolution mechanism set by KPLC under section 160(1)(a) of the *Act*, failing which the aggrieved party can then approach the

Energy and Petroleum Regulatory Authority for redress under section 160(3) of the *Act* and if still aggrieved, proffer an appeal in the Energy and Petroleum Tribunal under section 36(4) of the *Act* and if still aggrieved, seek a review before the same Tribunal or proffer an appeal at the High Court under section 37 of the *Act*. This is the justice ladder for disputes relating to electrical energy.

32. In other words, this Court is without jurisdiction to determine this particular dispute between the Applicant and the Respondent.

(ii) Whether the Application has met the test for grant of an order of police assistance

33. Even in circumstances where an Application is to be determined ex parte or deemed unopposed, the duty of the Court to consider whether the Application (plus the prayers sought) is legally sound and worthy granting is not taken away thereby. See *Lucia Wambui Ngugi v. Kenya Railways & Another*, Nairobi HCMA Number 213 of 1989 (per Mbito, J., as he then was).

34. Courts are temples of justice and the last frontier of the rule of law and this remains so, even in circumstances where a suit or Application is deemed unopposed. In *International Centre for Policy and Conflict v. Attorney General & Others*, Nairobi Miscellaneous Civil Cause Number 226 of 2013, the High Court expressed itself as follows: "Courts are the temples of justice and the last frontier of the rule of law and must therefore remain steadfast in defending the letter and the spirit of the *Constitution* no matter what other people may feel. To do otherwise would be to nurture the tumour of impunity and lawlessness. That tumour like an Octopus unless checked is likely to continue stretching its eight tentacles here and there grasping powers not Constitutionally spared for it to the detriment of the people of this nation hence must be nipped in the bud."

35. A Court of Law must consider the Application in the context of the facts, evidence and the relevant law. It is not automatic that for any unopposed Application, the Court will as a matter of cause grant the Orders sought. It behooves the Court to be satisfied that prima facie, with no objection, the Application is meritorious and the prayers may be granted. The Court is under a duty to look at the Application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the Application a non-starter. In the Supreme Court decision in *Gideon Sitelu Konchellah v. Julius Lekakeny Ole Sunkuli & 2 others* (2018) eKLR, Ojwang, SCJ (as he then was), Ibrahim, Wanjala, Lenaola and Ndung'u, SCJJ., had this to say about what a Court is expected to do in situations where an Application is unopposed: "[9]...The upshot is that as the 2nd and 3rd Respondents had categorically stated that they do not oppose the Application, the Court will be excused for therefore deeming the Application as being unopposed entirely. [10] Be that as it may, as a Court of Law, we have a duty in principle to look at what the Application is about and what it seeks. It is not automatic that for any unopposed Application, the Court will as a matter of cause grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the Application is meritorious and the prayers may be granted. The Court is under a duty to look at the Application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the Application a non-starter..." (Emphasis supplied)

36. First, having met the foregoing jurisdictional impediment and second, having addressed my judicial mind to the live and unresolved controversies raised by the Respondent, and third, considering the fact that evidently a demand for rental arrears have been unjustifiably mixed with a demand by KPLC for electricity consumption arrears and the blend incorrectly labelled by the Applicant as "rent arrears", and fourth, the Applicant having failed to discharge its obligation to make a full and frank disclosure mandatorily required in ex parte Applications as was enunciated *Owners of Motor Vessel "Lillian S" case*, this Court finds and so concludes that this Application has failed to surmount the threshold for police assistance.

Part vi: Disposition

37. Wherefore this Court finds the Application without merit and dismisses it. Since the Application was not frivolous, this Court directs that each party shall bear its own costs of this Application. The fees and costs incurred by the auctioneer so far shall abide the outcome of the decision of the BPRT.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 8TH DAY OF AUGUST,2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Applicant:.....

Advocate for the Respondent:.....

Court Assistant:.....