Mjad Investments Limited & another v Fujita Corporation Kenya Branch (Civil Appeal E051 of 2023) [2025] KECA 1698 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1698 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E051 OF 2023

F TUIYOTT, LA ACHODE & AO MUCHELULE, JJA

OCTOBER 24, 2025

BETWEEN

MJAD INVESTMENTS LIMITED ..... 1ST APPELLANT

SEMIX ENTERPRISES LIMITED ..... 2ND APPELLANT

AND

FUJITA CORPORATION KENYA BRANCH ..... RESPONDENT

(An appeal against the ruling and order of the Environment and Land Court at Mombasa (L.L. Naikuni, J.) dated 7th March 2023 in ELC No. 71 of 2022)

JUDGMENT

1. This is an appeal from the ruling dated 7th March 2023 by the learned L.L. Naikuni, J. of the Environment and Land Court (ELC) at Mombasa in which the suit by the appellants, Mjad Investments Limited and Semix Enterprises Limited, against the respondent, Fujita Corporation Kenya Branch, was struck out with costs for want of jurisdiction. This followed the suit filed on 30th June 2022, together with an interlocutory application for temporary, and in the alternative, a mandatory injunction, by the appellants. The respondent reacted by filing a notice of preliminary objection contesting the court's jurisdiction to hear and determine the issues in the suit and application. The Court sustained the objection, hence this appeal.

2. The grounds of the appeal were as follows:-

> " 1) The learned judge erred in law and in fact by determining that the defendant's preliminary objection was merited and was properly before the court when the same did not meet the legal threshold set down under the law with regard to what constitutes a proper preliminary objection.

2. The learned judge erred in law and in fact by determining that a landlord tenant relationship existed as between the parties herein and wrongly held that the dispute herein falls within the purview of the Business Rent Tribunal.

3. The learned judge erred in law and in fact by failing to appreciate that the dispute before the court was not about tenancy rights, but touches on the use, occupation, interest and title in land and thus the same is squarely within the mandate of the Environment and Land Court as duly constituted under the law.

4. The learned judge erred in law and in fact by too readily acceding to the ouster of the court's jurisdiction and in doing so, trashed his duty to sit and accord parties justice through hearing of the parties' respective cases.

5. The learned judge erred in law and fact by failing to appreciate the mandate of the Environment and Land Court as constituted under the law and thereby improperly upheld the defendant's preliminary objection on lack of jurisdiction."

3. We should give the background of this appeal. The appellants claimed to be the registered properties LR. No. MN VI 5273 and LR No. MN VI 5274 (the suit properties) measuring about 5.62 hectares. Their case was that in or about the month of January 2020 the respondent had without any colour of right or permission trespassed on the suit properties using them as a laydown area for equipment and works related to the project that the respondent was undertaking at Mombasa Port. When the appellants became aware of the trespass, they engaged the respondent. In the negotiations, it was agreed that the respondent's occupation be regularized on a portion measuring 1.6 hectares in respect of which the parties were to go into a 2- year lease with the respondent as the tenant for the period commencing 1st March 2020 on a monthly rent of Kshs.584,000 = including a two months security deposit. In or about August 2020, a draft lease was drawn by the appellants and passed over to the respondent for input, approval and execution. The respondent refused and or neglected to act. Instead, by letter dated 4th December 2020 the respondent informed the appellants that it had come to its knowledge that the Kenya Government had in 2014 compulsorily acquired the suit properties and paid compensation; and, that, subsequently, the appellants had signed a Deed of Surrender dated 20th May 2020 in favour of the Government and the title had been endorsed accordingly. The appellants wrote back to dispute this, and stated that what had been compulsorily acquired were other parcels and not the suit properties. Several meetings between the parties were held. When there was no success in the negotiations, the appellants filed the instant suit seeking permanent and mandatory injunctions, mesne profits calculated at Kshs.584,000 = per month from January 2020 to the date of final handing over of the suit properties, general damages and costs.

4. The suit was filed along with an application that sought, among other prayers, a mandatory injunction directing the respondent to remove all its equipment and developments from the suit properties.

5. In answer to the application, the respondent filed grounds of opposition to say that the threshold for the grant of a mandatory injunction, or any alternative interim orders, had not been met. Together with the grounds of opposition, the respondent filed a notice of preliminary objection to urge that the suit and application had been brought in clear disregard of the law and were therefore an abuse of the process of the court. The reason being that, the claim was a tenancy issue between the parties, and that under the provisions of the *akn ke act 1965 13 Landlord and Tenant (shops, Hotels and Catering*

Establishments) Act (Cap. 301), the ELC had no jurisdiction to hear or determine the dispute. The dispute belonged to the Business Premises Rent Tribunal, it was urged.

6. The parties were directed to argue the issue of jurisdiction as a preliminary point. Following the arguments, the learned L.L. Naikuni, J. found that the appellants had admitted that there was a lease agreement between them and the respondent; the agreement had not been reduced into writing, and therefore under section 2 of the *akn ke act 1965 13 Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* was a controlled tenancy; and, therefore, the dispute belonged to the Tribunal set up under the Act, and could only come before the ELC on appeal. The learned Judge found that the court did not have jurisdiction, and ordered the suit and application to be struck out with costs. This is what led to the present appeal.

7. When the appeal came before us for hearing, learned counsel Mr. Eric Busieka appeared for the appellants while learned counsel Ms. Linda Aluvale appeared for the respondent. Each had filed written submissions which they highlighted. In the submissions by learned counsel Mr. Busieka, once the respondent disputed that the appellants owned the suit properties and challenged the claim for eviction, this dispute squarely fell for decision by the ELC; and that it had nothing to do with the Business Premises Rent Tribunal. According to learned counsel, the ELC's jurisdiction was derived from Articles 162(2)(b) and 165(5)(b) of *akn ke act 2010 constitution the Constitution*, sections 13 of the ELC Act and section 150 of the *akn ke act 2012 6 Land Act*, 2012.

8. On the other hand, learned counsel for the respondent argued that, according to the plaint and the annexed correspondences between the parties, there existed a controlled tenancy between the parties by dint of section 2(1) of the *akn ke act 1965 13 Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*. It was argued that, pursuant to the oral agreement, the appellants gave consent to the respondent's occupation of the suit properties but that the latter failed to pay the agreed rent, hence the suit. Learned counsel asked us to agree with the learned Judge that the ELC did not have jurisdiction to hear and determine the matter. Therefore, it was further urged, the appeal was for dismissal.

9. We have anxiously considered the record, the appeal and the rival submissions. We are called upon to determine whether the preliminary objection was properly grounded, and whether, indeed, the ELC lacked jurisdiction to hear and determine the dispute between the appellants and the respondent.

10. The appellants claimed to be the registered owners of the suit property. From their plaint and correspondence with the respondent, the ownership was contested. The respondent claimed that the suit properties were public land, having been compulsorily acquired by the Government of Kenya. Consequently, the claim by the appellants that the respondent had trespassed onto the properties was under challenge. Secondly, the appellants had sought to convert the alleged illegal occupation into a tenancy. They proposed a lease agreement which they sent to the respondent who declined to sign. Whether or not there was a tenancy agreement was challenged. We raise these issues because, according to Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors Ltd [1969] EA 696 and Attorney General & Another -vs- Andrew Mwaura Githinji & Another [2016] eKLR, both of which the learned Judge cited in his ruling, a preliminary objection must be based on legal grounds, not on disputes about the facts of that case. It proceeds on the basis that the facts alleged by the opposing party are true, and the court does not need to ascertain disputed facts to decide the case. Therefore, where the facts have to be ascertained, a preliminary objection cannot be raised (see Aviation & Allied Workers Union Kenya -vs- Kenya Airways & Others [2015] eKLR).

11. We determine that there were various contested facts which could not have formed the basis of a preliminary objection. The raised preliminary objection was not properly taken, and the learned Judge erred in finding that the objection was sustainable.

12. The suggestion that the illegal occupation of the suit premises by the respondent be converted into a tenancy came from the appellants. According to appellants, there was no concurrence from the respondent who, in any case, contended that the said properties did not belong to them. The learned Judge in finding that there was a controlled tenancy between the parties, misapprehended the facts of the case.

13. In our considered view, the appellants were claiming that their rights over the suit properties in respect of which they held title had been interfered with by the respondent who had no colour of right or permission to occupy the same. The respondent denied that the appellants owned the suit properties. According to it, the said properties had been compulsorily acquired by the Government of Kenya in 2014. Under Article 162(2)(b) of *akn ke act 2010 constitution the Constitution*, section 13 of the Environment and *akn ke act 2012 6 Land Act* and section 150 of the *akn ke act 2012 6 Land Act*, 2012, this dispute belonged to the ELC. Consequently, the learned Judge declined jurisdiction in error.

14. We consequently allow the appeal, and set aside the orders and decree contained in the ruling that was delivered on 7th March 2023. The appellants' claim shall be heard and determined by a Judge other than the learned L.L. Naikuni, J.

15. Because costs follow the event, we order that the costs of the appeal be paid to the appellants by the respondent.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF OCTOBER 2025

F. TUIYOTT

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

Signed Deputy Registrar