Woburn Estate Limited & another v Mwekangi Holdings Limited (Civil Appeal 33 of 2020) [2023] KECA 765 (KLR) (23 June 2023) (Judgment)

Neutral citation: [2023] KECA 765 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL 33 OF 2020

P NYAMWEYA, JA

JUNE 23, 2023

BETWEEN

WOBURN ESTATE LIMITED ..... 1ST APPELLANT

WOBURN MANAGEMENT LIMITED ..... 2ND APPELLANT

AND

MWEKANGI HOLDINGS LIMITED ..... RESPONDENT

(An Appeal from the Ruling and Order of the Environment and Land Court at Mombasa (J.O. Olola J.) dated 23rd January 2020 in Malindi ELC Case No. 289 (OS) of 2016)

JUDGMENT

1. This appeal arises from a ruling delivered on January 23, 2020 by the Environment and Land Court at Malindi (Olola J.) that dismissed a preliminary objection dated January 10, 2019 raised by Woburn Estates Ltd and Woburn Management Company Club (the Appellants herein) to the suit filed therein being Malindi ELC Case No 289 (OS) of 2016 by Mwekangi Holdings Limited, the Respondent herein. The Respondent had instituted the suit in the Environment and Land Court (hereinafter the trial Court") by a Plaint dated October 27, 2016, and contended that it was a lessee of an apartment in Woburn Residence Club, from the 1st Appellant who was the lessor of the property while the 2nd Appellant was the Management Company of the said property.

2. The main claim in the said suit was that under the subject lease agreement, the service charge for the suit premises was fixed at Kshs 10,000/- and that the same could only be revised after the Appellants supplied proper accounts of the management and upon the said accounts being ratified by the Respondent. However, that the Appellants in total defiance of the provision of the said lease agreement had raising and invoicing the Respondent a sum of Kshs 36,500/- plus VAT as service fees and a further additional sum of Kshs 2,000/- plus VAT for washing machine at the common laundry. Further the Appellants illegally demanded that the Respondent pay for repairing the standing in generator which

charges ought to be part of the service charge. The Respondent contended that the vide an email dated August 8, 2016, the Appellants sent to Hon. Kiema Kilonzo, not a director of the Respondent, a purported demand for Kshs 304,555.32/- as at July 31, 2016. They argued that the sums were false and illegal as they did not understand how they were computed.

3. The Respondent therefore prayed for:

    a. A declaration that the Service Charge payable by the Plaintiff (as) per the Lease Agreement is Kshs 10,000/- per month;

    b. An order restraining the Defendants from charging over the above the Service Charge at the rate of Kshs 10,000/- and an order restraining the Defendants from issuing or raising any other invoices apart from the Kshs 10,000/- Service Charge fees;

    c. A permanent injunction restraining the Defendants from interfering in any manner whatsoever with the Plaintiff's occupation (and) possession of the suit property known as Apartment 5B (situated) at the 'Woburn Resident Club;

    d. An order of taking of accounts for all Service Charge paid by the Plaintiff since April 19, 2015 to date; and

    e. Costs of the suit and interest thereon.

4. The Appellants in response to the suit filed a statement of defence and counterclaim dated 8th November 2016, wherein they denied the Respondent's assertions and stated by way of Counterclaim that the Plaintiff was in arrears of Service Charge in the amount of Kshs 302,000/- calculated at the rate of Kshs 42,340/- inclusive of VAT. The Respondent responded to the Appellant's defence vide their Reply to Defence and Defence to the Counterclaim dated March 20, 2017, where they reiterated the contents of their plaint while denying the assertions of the Counterclaim. The Appellants also filed the Notice of Preliminary Objection dated January 10, 2019, objecting to the entire suit on the grounds that:-

    1. The Court has got no jurisdiction to hear and entertain this suit in view under Clause 2.2 (a) of Part B of the Fourth Schedule of the Lease Agreement.

    2. On September 11, 2012, the 2nd Appellant wrote to the Chairman of the Institute of Surveyors Kenya in accordance with the Fourth Schedule, Part B Clause 2.5 of the Lease Agreement herein.

    3. On the September 20, 2012 the Chairman of the Institute of Surveyors Kenya appointed an independent Valuer by the names Paul Wambua who was to audit Service Charge account of Woburn Management Ltd Condominium.

    4. Paul Wambua did a report which was supplied to all apartment owners including the Responder herein.

    5. The Wambua report is final and binding upon all parties herein under Clause 2.5 B of the Fourth Schedule of the Lease Agreement.

    6. The Court of Appeal has already ruled in Civil Appeal No 20 of 2018 that the Court has no jurisdiction upon Wambua report being issued

in accordance with Clause 2.5 Part B of the Fourth Schedule and that Paul Wambua lacks the mandate to withdraw the report; and

7. The Wambua report has been declared final and binding upon all parties herein.

5. The Respondent thereupon filed Grounds of Opposition dated February 6, 2019 to the Appellants' Objection stating that Article 50 (1) of *the Constitution*, conferred an unalienable right to be heard. Besides, the issues raised were matters of fact and law that could only be determined upon hearing of the substantive suit. The Appellant denied that any report was generated pursuant to clause 2.2 (a) of Part B Fourth Schedule of the Lease Agreement. Additionally, the alleged report by the said Paul Wambua if at all it existed, was withdrawn since it was premised on falsified statement of accounts by the Appellants.

6. Further, a clause in a mere agreement between parties could not deprive the Court of law jurisdiction to hear any matter since jurisdiction is conferred or deprived by law. The Respondent contended that they were not a party to Mombasa Civil Appeal No 20 of 2018 which was in any event being challenged in the Supreme Court vide Notice of Appeal dated October 5, 2018 and therefore it would not only be unjust, but premature and unfair to allow the Notice of Preliminary Objection on the basis of the said Judgment. It was thus the Respondent's case that the suit could not be determined in a summary manner as sought by the Appellants and its right to a fair trial would be prejudiced, since the Respondent had a right to challenge the allegations set out in the Notice of Preliminary Objection by cross examination of witnesses at trial, and it was only fair and just for it to be granted an opportunity to be heard. Further, that the Notice of Preliminary Objection lacked merit.

7. The matter was canvassed by way of submissions in the Trial Court and in dismissing the Preliminary Objection, Olola J. found that the only way the Appellants could demonstrate that the said Paul Wambua prepared the alleged report and that it was binding and conclusive of the dispute between the parties was by calling witnesses to produce the said Report and to have it tested by way of cross-examination. Therefore, that the Preliminary Objection did not raise any pure point of law capable of being determined without calling further evidence in support thereof.

8. The Appellants, being aggrieved by the trial Judge's Ruling proffered this appeal. In their memorandum of appeal dated June 18, 2020 and lodged on August 3, 2020, they raised five (5) grounds of Appeal on the broad area of the trial Court's jurisdiction, which was challenged on the grounds that the learned trial Judge erred by failing to appreciate and going contrary to the decision in Mombasa Civil Appeal No 20 of 2018 - Woburn Estate Limited & another versus Dysara Investment Limited, The Respondent therefore prays that the ruling of January 23, 2020 be set aside and substituted by a judgment of this Court allowing the Appellants preliminary objection dated the January 10, 2019.

9. We heard the appeal virtually on December 7, 2022, when learned counsel Mr. Otara, appeared for the Appellants while learned counsel Mr. Patrick Ngaine appeared for the Respondents. This being a first appeal, the duty of this Court is reiterated as was set out in the decision of *Selle & another v Associated Motor Boats Co. Ltd & others* (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and only depart from the findings by the Trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane v Olenja* (1968) KLR 661 or where its discretion was exercised injudiciously as held in *Mbogo & another v Shah* (1968) EA.

10. Mr. Otara relied on written submissions dated March 10, 2022 cited the decision in *Bank of Uganda v Banco Arable Esponol* (2002) EA 333 to urge that that under clause 2.5 in Part B of the lease agreement,

the intention of the parties was that any report prepared by an expert duly appointed by the Chairman of the Institute of Surveyors of Kenya was final and binding, and that this Court held in Mombasa Civil Appeal No 20 of 2018 that parties were bound by the terms of their respective leases to have the dispute resolved through mechanisms set out thereunder. Hence that proceeding with the hearing of the suit on service charge would amount to being in contempt to this Court, which had ruled that the ELC had no jurisdiction to hear and determine the issue of service charge.

11. Further, that the learned trial Judge failed to appreciate the significance of the various facts that were common ground, and irrespective of the status of the Paul Wambua's report, the dispute between the parties could only be addressed through mechanisms set out in Clause 2.5 of the lease agreement. Therefore the Learned Judge erred by stating that the only way the Appellant could demonstrate that the said report was binding and conclusive was by calling the witnesses to produce the said report and have it tested by way of cross examination and failed to make any proper finding based on the evidence placed before him. The counsel cited the cases of *Filipo Fedrini v Ibrahim Mohamed Omar* [2018] and *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & another* [2001] eKLR, in submitting that the trial Judge erred by ignoring the decision of the Court of Appeal being Mombasa Civil Appeal No 20 of 2018, as it was not open to the learned Judge to disregard the principles of law emanating from the authorities cited.

12. Mr. Ngaine on his part highlighted the Respondent's written submissions dated December 5, 2022 and cited the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distribution* (1969) EA 696 to submit that the Preliminary Objection raised by the Appellants was on points of fact and not law and the only way the Appellant could prove the facts in the said Preliminary Objection was by calling witnesses to testify and for the testimony to be tested by cross examination. With regards to the trial Court's jurisdiction, the Respondent cited the decision by the Court (Nyarangi JA) in the case of *Owners of the Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] eKLR and by the Supreme Court of Kenya in in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR that a Court's jurisdiction flows from either *the constitution* or legislation , and pointed out that section 4 (1) of the *Environment and Land Court Act* established the Environment and Land Court as envisaged under Article 162 (2) (b) of *the Constitution* of Kenya while, section 13 of the *Environment and Land Court Act* stipulated the jurisdiction of the Court. Therefore, that a dispute resolution clause like in clause 2.5 could not oust the jurisdiction of the Environment and Land Court as pleaded by the Appellants. Lastly, on the import of the decision by this Court in Mombasa Civil Appeal No 20 of 2018, the counsel submitted that the Respondent was not a party in the said appeal and the Respondent had a right to be heard by the trial Court, and relied on Article 50 (1) of *the Constitution of Kenya* on the right to a fair hearing.

13. The issue before us is whether the trial Judge's exercise of discretion in dismissing the Appellants' Preliminary Objection dated January 10, 2019 was in error. The grounds upon which this Court can interfere with the exercise of the learned Trial Judge's discretion were set out in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of

which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

14. A summary of the Appellants' case in this respect is that the trial Court's jurisdiction was ousted by the utilisation of the dispute resolution mechanism under clause 2.5 of the subject lease agreement which was final and binding and as held by this Court in Mombasa Civil Appeal No 20 of 2018. In this regard, it is notable that the trial Judge addressed his mind to the applicable law and principles in upholding a preliminary objection as held in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distribution* (supra), namely that a preliminary objection consists of a point of law which if argued as a preliminary point may dispose of the suit. We have reproduced the grounds of the preliminary objection raised by the Appellants in this regard, and while we to a certain extent agree with the finding by the trial Court that many of the grounds raised by the preliminary objection were matters of fact as regards the processes of preparation of the independent valuer's report, there were three grounds that raised the issue of jurisdiction, which is a pure question of law, namely grounds 1, 6 and 7 as follows:

> 1) The Court has got no jurisdiction to hear and entertain this suit in view under Clause 2.2 (a) of Part B of the Fourth Schedule of the Lease Agreement....
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> 6. The Court of Appeal has already ruled in Civil Appeal No 20 of 2018 that the Court has no jurisdiction upon Wambua report being issued in accordance with Clause 2.5 Part B of the Fourth Schedule and that Paul Wambua lacks the mandate to withdraw the report; and
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> 7. The Wambua report has been declared final and binding upon all parties herein.

15. The Fourth Schedule to the lease agreement in this regard contained provisions on the service charge, and clause 2.2 in Part B thereof provided the manner of computing the service charge payable based on periodical expenditure as shown by accounts prepared by the Appellants, while clause 2.5 the manner of resolution of disputes, which was to be by a person appointed by the Chairman of the Institute of Surveyors of Kenya. As regards the decision of this Court in Mombasa Civil Appeal No 20 of 2018, the appeal therein was by the same Appellants herein after the ELC had dismissed their Preliminary Objection that the Court had no jurisdiction in similar circumstances, where a different group of lessees had also challenged the service charge payable with respect to the same suit premises. The findings by this Court (Visram, Karanja & Koome (as she then was), JJ.A) were as follows:

> " 19. Based on the foregoing, we, unlike the learned Judge, find that the objection raised by the appellants was on a pure point of law, namely, jurisdiction. It was also based on uncontroverted facts, that the parties had agreed on a dispute settlement mechanism under Clause 2.5 of the Fourth Schedule of the various leases which reads in part:
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> "If the owner shall at any time during the Term object to any item of the Charges as being unreasonable or, the insurances mentioned in Section 5 as being insufficient then the matter in dispute shall be determined by a person to be appointed by the Chairman for the time being of the Institute of Surveyors of Kenya (or such institution 's successors or assign) who shall in making his determination act as an expert and not as an arbitrator and whose decision shall be final and binding upon the parties ..."

20. Our position is further fortified by the following sentiments of Law, J.A in the Mukisa biscuit case:

> " ...a 'preliminary objection' consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration." [Emphasis added]

20. In light of the fact that parties to a contract are free to determine terms that govern their relationship and courts role is limited to enforcement of those terms (See Filipo Fedrini v Ibrahim Mohamed Omar [2018] eKLR) we agree with the appellants that the ELC had no jurisdiction to entertain the dispute which was centred around service charge. The parties were bound by the terms of their respective leases to have the dispute resolved through the mechanism set out thereunder.

20. It is also not in dispute that the parties invoked the dispute resolution mechanism in question which ultimately resulted in the report prepared by Mr. Wambua. As for the effect of the letter dated 15th January, 2014 we believe that Mr. Wambua who acted as an expert within the terms of the dispute resolution mechanism lacked the mandate or power to withdraw his report. Consequently, the learned Judge erred in relying on the allegation of withdrawal of the report as the basis of dismissing the preliminary objection."

16. The said decision addressed an identical preliminary objection raised by the Appellants and even though the lessees may have been different, they were clearly suing in the same capacity as the Respondent herein, namely as lessees of the Appellants, and the trial Court was in this respect bound by the findings therein under the doctrine of precedent. As regards the other issues raised by the Respondent in its Plaint, it is also instructive that the Supreme Court of Kenya has held as follows in as regards exhaustion of alternative remedies in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 Others* [2019] eKLR:

> "

> "(116) The foregoing verdict also finds support in an adage principle in administrative law of "Exhaustion of Administrative Remedies" and from the jurisprudence emanating from this Court and the lower Courts, which has been restated with notoriety to the effect that, where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance. see Alphonse Mwangemi Munga & 10 Others v African Safari Club Ltd [2008] eKLR Narok County Council case v Trans Mara

County Council [2000] 1 EA 161 Kones v Republic & Another ex parte Kimani wa Nyoike & 4 Others (2008)3 KLR (EP); Speaker of the National Assembly v Njenga Karume

(2008)1 KLR (EP) 425, Francis Mutuku v Wiper Democratic Movement - Kenya & Others [2015] eKLR David Ochieng Babu v Lorna Achieng Ochieng & 2 others [2017] eKLR among other cases not referred to. The Court of Appeal in Geoffrey Muthinja & Another v Emanuel Muguna Henry & 1756 Others [2015] eKLR held that:

"We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution outside of courts. This accords with Article 159 of *the constitution* which commands Courts to encourage alternative means of dispute resolution."

17. The long and short of our findings is that the trial Court erred in dismissing the Appellants' preliminary objection and did not take into account relevant facts of the previous decision in Mombasa Civil Appeal No 20 of 2018, and the dispute resolution clause in the contract between the parties, as well as the attendant principles of law. These are justifiable grounds upon which we can interfere with the exercise of the learned trial Judge's discretion. We therefore allow this appeal, and set aside the ruling and orders by the trial Court delivered on January 23, 2020 in Malindi ELC Case No 289 (OS) of 2016. In their place we uphold the preliminary dated January 10, 2019 raised by Woburn Estates Ltd and

    Woburn Management Company Club, the Appellants herein, and hereby strike out the suit filed in Malindi ELC Case No 289 (OS) of 2016 by Mwekangi Holdings Limited, the Respondent herein.

18. Given that this appeal was solely as a result of the decision by the trial Court on jurisdiction, we order that each party meets their own costs of the appeal.

19. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF JUNE 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

////Signed

DEPUTY REGISTRAR