



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A)

CIVIL APPEAL NO. 27 OF 2018

BETWEEN

NAKUMATT HOLDINGS LIMITED.....1ST APPELLANT

ATUL SHAH.....2ND APPELLANT

AND

IDEAL LOCATIONS LIMITED.....RESPONDENT

(Being an appeal from the Ruling of the Environment and Land Court at Mombasa (C. Yano, J.) delivered on 5th March 2018

in

ELC Case No. 400 of 2017)

JUDGEMENT OF THE COURT

1. The appellants are aggrieved by a ruling of the Environment and Land Court (ELC) at Mombasa (*C. Yano, J.*) delivered on 5th March 2018 allowing a summary judgment application by the respondent against them. By that ruling, the court: decreed that the appellants were in breach of a sub-lease agreement that had been entered into between the parties; authorized the respondent to exercise its right of forfeiture and peaceable re-entry into the leased premises; ordered the 1st appellant to immediately vacate the leased premises; an ordered the appellants to pay to the respondent an amount of Kshs.27,812,108.52 being outstanding rent, service charge and promotion fund as at 1st November 2017. The appellants were also condemned to pay the respondent's costs of the suit.

2. The appellants have faulted the ELC for refusing to uphold their claim that the respondent's suit before that court contravened Section 430 of the Insolvency Act, 2015; that the Judge disregarded the fact that an insolvency cause with regard to the affairs of the 1st appellant, being Insolvency cause No. 10 of 2017, was pending before the High Court and an administrator appointed over the affairs of the 1st appellant, and orders of stay issued in that cause; that the Judge erred in holding that the respondent's claim was uncontested and the appellants had no defence.

3. The background, in brief, is that the respondent, Ideal Locations Limited, as lessor, (the landlord) granted a lease to the 1st appellant, Nakumatt Holdings Limited, (Nakumatt) over a portion of premises known as City Mall, erected on Land Reference Numbers 14407 and 16088, Section 1, Mainland North Mombasa Municipality. The portion of premises let to Nakumatt thereunder comprised of approximately 87,518 square feet situated on the Ground and First floor of the Mall. The lease was for a term of 11 years from 1st November 2013 and was subject to the terms and conditions set out in the sublease.

4. Nakumatt appears to have ran into challenges in meeting its obligations under the sublease. On 3rd November 2017 the landlord commenced suit against it before the ELC, being Civil Case No. 400 of 2017, seeking a declaration that Nakumatt was in breach of the terms of the lease; an order for Nakumatt to immediately vacate the premises; judgment for outstanding rent, service charge and promotion fund as at 1st November 2017 then standing at Kshs.26,664,852.52.

5. The plaint was amended on 17th November 2017 to join Atul Shah as the 2nd respondent in the suit by virtue of his having guaranteed the due performance by Nakumatt of its obligations under the sublease.

6. On 23rd November 2017, the landlord presented an application before the ELC under the provisions of Order 36 Rule 1 of the Civil Procedure Rules and Section 561(4) of the Insolvency Act, 2015 seeking: approval of the court to continue the suit against the appellants; summary judgment against the appellants as prayed in the amended plaint; an order for Nakumatt to immediately vacate the premises and in default liberty to evict Nakumatt forcibly.

7. That application was supported by an affidavit sworn by a director of the Landlord, Anish Doshi, and was based on the grounds that Nakumatt had breached the terms of the sublease by, among other things, defaulting in payment of rent, service charge and promotion fund; materially changing the nature and mode of trading by seeking a merger with another entity; that Nakumatt's performance, as the anchor tenant at the mall, was adversely affecting other businesses therein; that the landlord risked losing the property to its lender to which it was charged; that the 2nd appellant, as guarantor, had failed to indemnify the landlord; that the possibility of Nakumatt paying the rent had become increasingly remote; that Nakumatt's application for appointment of an administrator before the High Court at Nairobi in Insolvency Cause No. 10 of 2017 had been rejected; and that it was a matter of public notoriety that Nakumatt was facing operational challenges.

8. In opposition to the application, the appellants filed grounds of opposition and notice of preliminary objection in similar terms asserting that the ELC "*is not vested with the jurisdiction to hear and determine the application*"; that the prayers in the application as well as those in the main suit contravene Section 430 of the Insolvency Act; that the application as well as the suit were "*premature in view of the ongoing proceedings seeking to wind up*" Nakumatt in Insolvency Petition No. 10 of 2017; that the subject matter of the application and the suit were under judicial consideration before the High Court in the said petition; and that the orders sought by the landlord could not in those circumstances issue.

9. The application and the preliminary objection were heard together following which the learned Judge rendered the impugned ruling on 5th March 2018. The Judge held that the ELC had jurisdiction over the matter as it arose from a landlord and tenant relationship and that no provisions of the Insolvency Act were contravened. On the summary judgment application, the Judge held that the appellants had not challenged the respondent's claim and that on the face of the uncontroverted facts, the appellants did not put forward any triable issues and did not have a defence to the claim.

10. As indicated, the appellants are dissatisfied with that ruling. Urging the appeal before us, **Mr. Ngunze**, learned counsel for the appellants, relied on his written submissions which he highlighted. He submitted that, although the appellants' advocates then on record inadvertently omitted to apply for stay of the proceedings before the ELC in light of the pending insolvency proceedings before the High Court, the omission on the part of the advocates should not be visited upon the appellants; that in any event the High Court issued an order on 28th August 2017 in the Insolvency Cause prohibiting attachment, sequestration, distress or execution against assets of Nakumatt; that the respondent was privy to those proceedings before the High Court and was aware of those orders; that the proceedings before the ELC were therefore in blatant disregard of those orders and the doctrine of *pendente lite* and estoppel.

11. Furthermore, counsel submitted, the High Court, in the insolvency proceedings, appointed an administrator in respect of Nakumatt on 22nd January 2018 for the benefit of all the creditors; that on 29th January 2018, further orders were issued by the High Court declining requests by landlords of Nakumatt to re-enter their respective premises, without barring other applications to the same effect at a future date; that in those circumstances, all outstanding arrears, if any, remained the subject of administration and would be payable upon approval of the administrator's schedule of payment by creditors with the sanction of the court; and that those orders are still in force.

12. It was submitted that the ELC "*fallaciously misdirected itself*" and conferred upon itself jurisdiction to render a determination on the tenancy relationship while such application ought to have been entertained exclusively by the Insolvency Court where insolvency proceedings had already been initiated and where an application for re-entry had previously been made and rejected; that where, as here, insolvency proceedings are pending before the High Court, the ELC has no jurisdiction over the matter; that under Section 2 and Section 561 of the Insolvency Act, it is only the High Court, and not the ELC, that can grant approval for the exercise of the right of forfeiture and the ELC had no jurisdiction to entertain the respondent's application in that regard.

13. Counsel reiterated that by the time the ELC granted orders on 5th March 2018, there were already orders issued by the High Court appointing an administrator and barring landlords from summarily entering the premises and the ELC was duly informed of this; that by reason of the statutory provisions in the Insolvency Act, namely Sections, 1, 2, 430, 558, 559, 560, and 561 and Articles 162 and 165 of the Constitution and Section 13 of the ELC Act and Section 5 of the Civil Procedure Act and by reason of the court orders issued by the High Court, the ELC had no jurisdiction over the matter; that upon appointment of an administrator over the affairs of Nakumatt, there was a moratorium on its assets, and to the extent that the rented space is an asset of Nakumatt, it could not be repossessed.

14. It was submitted that under Section 430 of the Insolvency Act, attachments and other forms of execution against a company in liquidation is void; that under Section 558 of the Insolvency Act, an administration order prevents making of application for liquidation order and suspends such applications; that under Section 559, there is a moratorium on insolvency proceedings while an administration order is in effect; that under Section 560, there is a moratorium on other legal process while an administration order is in effect; and that under Section 5 of the Civil Procedure Act, courts are at liberty to try all civil suits unless, like here, they are barred. In further support, counsel referred to the case of ***Firstrand Bank Ltd v/a First National Bank vs. Seyffert and three similar cases 2010 6 SA 429(GSJ) Seyffert & Seyffert vs. Firstrand Bank Ltd 2012 ZASCA 81.***

15. Opposing the appeal, **Mr. W. Oluga**, learned counsel for the landlord, began his submissions by pointing out that in their amended memorandum of appeal, the appellants seek an order for the rehearing of the matter before a different judge of the ELC, thereby conceding that the ELC has jurisdiction over the matter. Further, the dispute between the parties being a dispute between a landlord and tenant involved "*use and occupation of land*", a matter within the jurisdiction of the ELC under Article 162(2)(b) of the Constitution and Section 13 of the ELC Act. Conversely, by reason of Article 165(5) of the Constitution, the High Court was divested of jurisdiction over the matter. Reference was made to the persuasive decisions of the High Court in that regard to the case of ***Rachel Chepng'eno Komen & 2 others vs. Mount Kenya University***; and ***James Moses Thamu & others vs. Joseph M. Muiruri [2013] eKLR.***

16. It was submitted that although Section 2 of the Insolvency Act refers to the High Court, it must be interpreted and understood within the meaning of Article 162(2)(b) of the Constitution and Section 13 of the ELC Act in that where a dispute involves use and occupation of land, the right court from which redress should be sought is the ELC.

17. It was urged that in the same way courts of equal status have jurisdiction to determine questions of infringement or violation of fundamental rights and freedoms under the Bill of Rights under Article 162 of the Constitution in matters within their jurisdiction, in spite of Article 165(3)(b) of the Constitution which confers jurisdiction in that regard to the High Court, the same principle should apply in insolvency matters and in the same manner, the specialized courts should be able to determine insolvency questions arising in matters within their jurisdictional remit.

18. As regards the complaint that Section 430 of the Insolvency Act was contravened, counsel submitted that the Judge correctly held that the respondent was not seeking to do any of the things enumerated under that provision; that the respondent was merely seeking to exercise its right of peaceable re-entry into its premises; that under Section 561(4)(e) and (f) of the Insolvency Act, a landlord may exercise a right of forfeiture by peaceable re-entry with the approval of the court; that on learning of the existence of the insolvency cause after it was brought to its attention through the appellants' advocates letter of 14th November 2017, the respondent immediately filed an amended plaint and the summary judgment application in which it sought the court's approval to continue the suit; that by the time the respondent's application for summary judgment was heard on 22nd January 2018, there was only one application for administration that had been made by Nakumatt and the same was dismissed by **Onguto, J.** on 16th November 2017.

19. Regarding the orders given by the High Court on 22nd January 2018 appointing an administrator and barring landlords from re-entering premises, counsel pointed out that those orders were granted on the same date that the proceedings before the ELC were concluded, and those orders were not tabled before the ELC or brought to the attention of the ELC Judge; that the respondent was not a party to the order of the High Court given on 29th January 2018, declining requests by landlords of Nakumatt to re-enter their respective premises, and in any case that order did not bar applications by other landlords to the same effect at a future date; that the orders of 22nd January 2018 appointing an administrator and barring landlords from re-entering premises were not part of the record before the ELC and were introduced for the first time in this appeal.

20. It was argued that although this Court allowed the same to be introduced when it allowed the appellants to file additional evidence, the same cannot be used to fill a lacuna in their evidence before the lower court. In that regard, reference was made to the Supreme Court decision in **Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others [2018] eKLR** for the further proposition that additional evidence cannot be used to make a fresh case on appeal; that despite the appellants having been granted time on 10th January 2018 to file an affidavit and attach the application for administration and related documents, it did not do so; that given the material that was placed before the him, the ELC Judge arrived at the correct decision.

21. It was urged, on the strength of the persuasive authority in **Nova Holdings Ltd vs. Nakumatt Holdings Ltd [2018] eKLR**, that the commencement of insolvency proceedings does not by itself automatically stay all claims; that on the strength of the decision of this Court in **Kenya Hotels Limited vs. Oriental Commercial Bank Limited [2018] eKLR**, the Judge cannot be faulted on the basis of an issue that was not before him.

22. It was urged that the appellants did not file any affidavit or draft defence and did not therefore demonstrate that there was any bona fide triable issue that would have required trial. In that regard it was submitted that summary judgment was merited. The decision of this Court in the case of **Dhanjal Investments Ltd vs. Shabaha Investments Limited [1998] eKLR** was cited.

23. Counsel submitted that following the impugned orders given by the ELC on 5th March 2018, the appellants presented an application for review to the same court on 8th March 2018 and 11th July 2018 on the basis of which an order of reinstatement of Nakumatt to the premises was made conditional upon payment of rent arrears; that having pursued a review of the decision of 5th March 2018, an appeal cannot lie in respect of the same order. In that regard, reference was made to Section 80 of the Civil Procedure Act and to the case of **Mary Wambui Njuguna vs. William Ole Nabala [2018] eKLR**. Furthermore, an order of reinstatement to the premises having been granted by the ELC, this application is overtaken by events, it was urged.

24. It was submitted further that provisions of the Insolvency Act and the proceedings thereunder cannot in any case affect the orders given by the ELC on 5th March 2018 as against the 2nd appellant as the same are based on his guarantee.

25. We have considered the appeal and the submissions by counsel. The central question for our consideration is whether the ELC had jurisdiction to grant the orders that it did. In addressing that question, we are mindful of our duty on a first appeal as articulated by the Court in the often-cited case of **Selle vs. Associated Motor Boat Company [1968] E.A. 123** that:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

26. The learned Judge of the ELC fully appreciated that without jurisdiction, he could not entertain the matter. He said as much and referred to the pronouncement by the Supreme Court of Kenya in **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR** that a court of law can only exercise jurisdiction as conferred by the Constitution or other written law and cannot arrogate itself jurisdiction exceeding that which is conferred by law, as well as the earlier pronouncement by this Court in **The Owners of**

Motor Vessel “Lillian S” vs. Caltex Oil Kenya Ltd [1989] KLR 1 that jurisdiction is everything and that a court downs its tools if it is without jurisdiction is also pertinent.

27. As already noted, the objection on jurisdiction of the ELC taken by the appellants in the lower court was two-pronged: First, that ELC did not have jurisdiction to hear and determine the application; second, that the prayers in the suit and the application contravened Section 430 of the Insolvency Act and were premature in view of the insolvency cause in respect of Nakumatt pending in the High Court, which according to the appellants, is the court that has exclusive jurisdiction.

28. It was contended that bearing in mind that insolvency proceedings in respect of Nakumatt had been instituted before the High Court, the ELC could not entertain, or proceed with the matter before it without approval of the High Court; that there were orders given on 22nd January 2018 by the High Court in the insolvency cause appointing an administrator over Nakumatt and prohibiting landlords from re-entering premises and consequently, by reason of those orders and by reason also of Section 561 of the Insolvency Act, there was a moratorium and execution could not issue against Nakumatt and neither could proceedings against it be taken.

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.

32. That, however, is not the end of the matter. There is the question of insolvency proceedings and the appointment of an administrator in respect of Nakumatt under Part VIII of the Insolvency Act and the impact, thereof, if any, on the proceedings before the ELC. It is contended by the appellants that the institution of insolvency proceedings before the High Court impacted the power of the ELC to deal with the matter and that by reason of Section 430 of the Insolvency Act nothing further could be done by the ELC.

33. To start with, and with respect to counsel for the appellants, there appears to be a conflation and confusion between the concept of liquidation of companies with that of administration of insolvent companies. Liquidation is dealt with under Part VI of the Insolvency Act while Administration is dealt with under Part VII of the same Act. The objects of liquidation and administration are different. The object of administration is to maintain a company as a going concern (S.522) while liquidation is a process in winding up and entails the ascertainment of the assets and liabilities of the company with a view to winding up the company (See *Black's Law Dictionary*, 10th edition).

34. Part VI and Part VII of the Insolvency Act contain separate and distinct but elaborate provisions dealing with the different processes. Section 430 of the Act on the basis of which the appellants contended that the ELC should have downed its tools, falls under Part VI of the Act and has no application to a company under administration.

35. However, Division 7 of Part VIII of the Insolvency Act provides for the effect of administration orders. Of relevance to this matter is Sections 560 and 561. Section 560 provides for a moratorium on other legal process while administration order has effect. Section 561 which provides for interim moratorium when application for administration order has been made. Section 560(1)(c) provides that while a company is under administration, if the court gives approval,

“a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the consent of the administrator or with the approval of the court.”

36. Section 561 applies if an application for administration in respect of a company has been made and the application has not yet been granted or dismissed or the application has been granted but the administration order has not yet taken effect. In effect it provides for interim moratorium during the pendency of an application for an administration order during which period, under Section 561(4)(e), a landlord may exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company only with the approval of the court.

37. Based on the record, the landlord in this case commenced the suit before the ELC on 3rd November 2017. By that time there is no evidence that there was in place an administration order in respect of Nakumatt. An application for an administration order that had been made in High Court Insolvency Cause No. 10 and 13 of 2017 (consolidated) was dismissed by **Onguto, J.**, in a ruling delivered on 16th November 2017 where the Judge expressed that he was “*not convinced and satisfied that an order for administration if made as requested is reasonably likely to achieve an objective of administration as detailed under the Act.*” Therefore, as at the time the ELC suit was filed the provisions of Section 560 of the Insolvency Act were not applicable.

38. On 17th November 2017, the landlord filed an amended plaint joining the 2nd appellant on the basis that he had guaranteed the due performance by Nakumatt of its obligations under the sub-lease. In the amended plaint, the landlord also sought the approval of the court “*to exercise its right of forfeiture and peaceable re-entry into the premises...*”

39. On 23rd November 2017, the landlord made the application (that culminated in the impugned ruling of 5th March 2018 the subject of this appeal) for summary judgment combined with a prayer under Section 561(4)(e) and (f) of the Insolvency Act for approval of the court to continue with the suit against the appellants. In the supporting affidavit reference was made to the pendency of Insolvency Cause No. 10 of 2017 and to the fact that an application for an administration order had been rejected by the High Court. As already pointed out, there was no replying affidavit by the appellants to that application but in their grounds of opposition to which we have already referred, they asserted that the court had no jurisdiction over the matter; that the suit and the application contravened Section 430 of the Insolvency Act; that the suit and application were premature in view of ongoing proceedings in of Insolvency Cause No. 10 of 2017 which was before the High Court.

40. Section 561(4)(f) provides that when Section 561 is in effect, a person may begin or continue legal process (including legal proceedings, execution, distress and diligence) against the company or the property of the company only with the approval of the court. Considering that the application for appointment of an administrator had been dismissed by the High Court on 16th November 2017, it does not appear to us that an interim moratorium under Section 561 was in effect or why the landlord considered it necessary to seek approval of the court in the circumstances. Had approval under Section 561 been required, we think the appellants would have been right that the proper court to consider the request for approval would have been the High Court that was seized of the insolvency matter, and not the ELC. Although the Insolvency Act recognises, that other courts may have a role to play in insolvency matters in certain instances (for instance Section 22 thereof), Section 2 of that Act specifies that the court means the High Court.

41. There is good reason, in our view, why Section 2 of that Act specifies the court to grant approval should be the court seized of the insolvency matter, namely the High Court. The administration of an insolvent company is for the benefit all creditors of such company and a situation where creditors separately attack or take assets of a company would defeat the overall objective of the administration. **Makau, J.**, captured the essence of it in *Fredrick Okoth Owino vs. T. S. S Grain Millers [2017 eKLR]* where, in holding that the competent court to grant leave under Section 561 of the Act is the High Court stated;

“It is my considered view that the Insolvency Act intends (sic) to create a central forum for dealing with all insolvency disputes that may have been filed against the company. It does not matter whether the suits are pending appeal before the senior courts, the only court with the original jurisdiction to grant leave to continue suits against companies under administration, in my opinion, is the High Court. Consequently, I agree with the administrator that this court lacks jurisdiction to entertain the application for leave to continue the Suit pending the administration of the respondent or to enjoin the administrator as a defendant.”

42. We respectfully agree. But having concluded, as we have, that neither Section 560 nor Section 561 were in effect at the material time, the application for approval to continue legal proceedings against Nakumatt or to seek an order for peaceable re-entry by the landlord was, in our view, otiose and of no consequence.

43. The appellants however point out that on 22nd January 2018 an administration order was granted by the High Court (*Ochieng, J.*). 22nd January 2018 is also the day that the proceedings before the ELC were concluded. There is no evidence that the order of the High Court was subsequently brought to the attention of the Judge who on the same day reserved his ruling the subject of this appeal.

44. It was, in our view, incumbent upon appellants to bring that matter to the attention of the ELC. They did not do so. Indeed, counsel for the appellants lamented during the hearing of this appeal that the advocates who were then acting for the appellants should have applied to stay the proceedings before the ELC on the basis of the administration order that was subsequently issued by the High Court. Considering, as already stated, that the application for an administration order had been dismissed by the High Court on 16th November 2019, the learned Judge of the ELC cannot be faulted for having proceeded with the proceedings that were before him in the manner that he did.

45. The result of the foregoing is that this appeal fails. It is hereby dismissed with costs to the respondent.

Orders accordingly.

Dated and delivered at Malindi this 28th day of November, 2019.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCI Arb)

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR