

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MILIMANI
COMMERCIAL & TAX DIVISION
CIVIL APPEAL NO. E 256 OF 2023

MICHELLE MUHANDA **APPELLANT**
VERSUS
LP HOLDINGS LTD **RESPONDENT**

(Being an Appeal from the Ruling of Hon. Caroline Okumu, Adjudicator delivered on 15 September 2023 in Nairobi Small Claims Court Case SCCOMM No. 5354 of 2023)

JUDGEMENT

1. The appeal arises from a claim by the Appellant against the Respondent filed in the Small Claims Court, in which the Appellant sought the following reliefs:
 - (a) The principal sum of KShs. 230,000.
 - (b) Punitive and exemplary damages under the Consumer Protection Act, Act No. 46 of 2012.
 - (c) Damages under Contract for the oppressive, high handed, outrageous, insolent and vindictive conduct.
 - (d) Costs of the Claim.
 - (e) Interest from the date of filing suit.
 - (f) Interest from the dated of default 31st October 2022.
 - (g) Any other relief that this Honourable Court may deem fit.

2. The claim arises from tenancy by the Appellant in the Respondent's property. The tenancy commenced in February 2015 until October 2022 when the Appellant vacated the premises. It was the Appellant's case that prior to vacating the premises, she invited the Respondent for a joint inspection of the property, which was in good condition, but the Respondent declined and/or never availed themselves. When the

Appellant demanded her deposit, the Respondent replied via letter dated 10 May 2023 with a Bill of Quantities for “proposed dilapidation – Woodlands Grove Villas, House No.3” amounting to Kshs 271,857.60, being the purported repair costs. It was the Appellant’s case that these costs were exorbitant and unsupported.

3. The Respondent entered appearance and filed its Response to the Claim as well as a Counterclaim for Kshs 224,000/-, being 2 months rent in lieu of notice and Kshs 74,760.60 being refund for payments for repairs and utilities.
4. By Notice dated 3 August 2023, the Respondent raised a Preliminary Objection on the following grounds:
 - (i) The claim relates to rental deposit by tenant and is outside the jurisdiction of the Honorable Court as contemplated under section 12 of the Small Claims Court Act;
 - (ii) Contrary to section 12 (3) of the Small Claims Court Act, the Claimant seeks a refund of rent deposit of Kshs 230,000/= together with punitive and exemplary damages to the sum of Kshs 800,000/=, all totalling Kshs 1,030,000/= which exceed the pecuniary jurisdiction of the Court limited to Kshs 1,000,000/=.
 - (iii) The suit is incompetent, an abuse of court process and ought to be dismissed with costs to the Respondent.
5. The Appellant filed Grounds of Opposition as follows:
 - (i) THAT under paragraphs 3 (a - h) of the Response, the Respondent confirms that the matter is arising out of a contract dated 1st February 2015.
 - (ii) THAT under Section 12 of the Small Claims Act, Act No. 2 of 2016 on Nature of Claims and Pecuniary Jurisdiction it states:
 - (1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—
 - (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract.

- (iii) THAT any award above 1 million is well understood to be forfeited as stated in the Statement of Claim that; “By filing this Claim, I, MICHELLE MUHANDA do hereby waive and forfeit the recovery of all sums in excess of KES 1, 000,000.00 excluding costs and interest.”
- (iv) THAT the Preliminary Objection is an abuse of Court and the Claimant prays that the same be dismissed with costs.
6. Parties filed their respective submissions in respect of the Preliminary Objection.
7. The Respondent relied on the case of ***Christofferson -vs- Kavneet Kaur Sehmi t/a the Random Shop (Civil Appeal E036 of 2022) KEHC 14035 (KLR)*** in arguing that the Small Claims Court does not have the jurisdiction to hear and determine a claim for rent deposit as it is not clothed with the requisite jurisdiction as per the provisions of Section 12 (1) of the Small Claims Court Act.
8. On the issue that the Appellant’s claim exceeds the pecuniary jurisdiction of the trial court, the Respondent submitted that although the Appellant claimed to have forfeited any award above Kshs 1,000,000/- in her Statement of Claim, a Small Claims Court can only entertain claims for amounts not exceeding Kshs 1 million. The Respondent relied on the cases of ***Wambua -vs- Kimondiu & 3 Others (Misc Applic No. 087 of 2022) [2022] KEHC 10426 (KLR)*** and ***Phoenix of E.A Assurance Company Ltd -vs- S. M. Thiga t/a Newspaper Service [2019] eKLR***.
9. The Appellant argued that the claim did not relate to collection of rent or rent arrears. There was no subsisting landlord – tenant relationship between the parties. The Appellant relied on four main authorities, which are also cited in the grounds of appeal
10. It was the Appellant’s submission that the suit relates to a refund of the rent/security deposit. which falls squarely within the ambit of Section 12 (1) b of the Small Claims Act as the same is “a contract to money held and received”.
11. On the issue of the pecuniary jurisdiction, the Appellant submitted that any award for damages is pronounced at the conclusion of the suit thus indicating the Court has no

jurisdiction over something it has not pronounced is very ill conceived. Further, in lodging her claim, the Appellant had waived and forfeited the recovery of all sums in excess of Kshs 1 million.

12. The Record of Appeal did not contain a copy of the Ruling or Decree from the trial court. However, the lower court file was placed before me, from which I was able to read the trial court's handwritten Ruling. In its Ruling, the trial court referred to the **Christofferson case (supra)** in its finding that a claim for rent and rent arrears is outside the jurisdiction and ought not to be entertained.
13. Aggrieved by the Ruling, the Appellant lodged an appeal on the following grounds:
- (i) THAT the Honourable Magistrate erred in law and in fact by upholding the Preliminary Objection that the Small Claims Court has no jurisdiction to hear the suit.
 - (ii) THAT the Honourable Magistrate erred in law and in fact by failing to appreciate the suit related to a post tenancy agreement; refund of the rent deposit, after the tenancy had ended.
 - (iii) THAT the Honourable Magistrate erred in law and in fact by failing to appreciate that, the adjudicatory bodies with authority to deal with post-tenancy disputes are civil courts.
 - (iv) THAT the Honourable Magistrate erred in law and in fact by failing to appreciate that, the Small Claims Court, as a Civil Court, has Jurisdiction to deal with post-tenancy disputes.
 - (v) THAT the Honourable Magistrate erred in law and in fact by failing to consider all the authorities that indicate the adjudicatory body with authority to deal with post-tenancy disputes are civil courts, including:
 - a. The Court of Appeal in **Nandlal Jivraj Shah & 2 others (all trading as Jivaco Agencies v Kingfisher Properties Limited [2015] eKLR**, Justices Asike-Makhandia, William Ouko, Kathurima M'inoti;
 - b. Justice Stephen N. Riechi in **Charles Kakai Mayungu Channan v David Mukwanja [2019] eKLR**;
 - c. Justice Bernard Emboso in **Johakim Abayo v Mokuia Damacline Nyamoita [2021] eKLR** and;
 - d. Lady Justice Roselyne Aburili in **DI Koisagat Tea Estate Ltd v Eritrea Othodox Tewhdo Church Ltd [2015] eKLR**.

14. Parties canvassed the Appeal by way of written submissions. The submissions filed herein by the parties mirrored those filed in the trial court.

Analysis & Determination

15. Section 38 of the Small Claims Court Act provides as follows:
- (1) A person aggrieved by the decision or an order of the Court may appeal against that decision or an order to the High Court on matters of law;
 - (2) An appeal from any decision or order referred to in sub section (1) shall be final.
16. In the case of ***Otieno, Ragot & Company Advocates -vs- National Bank Kenya Ltd [2020] eKLR***, the Court of Appeal addressed the duty of a court considering points of law.

“This is a second appeal. I am alive to my duty as a second appellate court to determine matters of law only unless it is shown that the courts below-considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. (See: Stanley N. Muriithi & Another versus Bernard Munene Ithiga (2016) eKLR).”

17. Similarly in the case of ***Mwita v Woodventure (K) Limited & another*** (Civil Appeal 58 of 2017) [2022] KECA 628 (KLR) (8 July 2022) (Judgment), the Court of Appeal stated:

–“This is a second appeal. Accordingly, the jurisdiction of this Court is limited to consideration of matters of law. As was held in the case of Stanley N. Muriithi & Another v Bernard Munene Ithiga [2016] eKLR, on a second appeal, the Court confines itself to matters of law only, unless it is shown that the court below considered matters it should not have considered, or failed to consider matters it should have considered, or looking at the entire decision, it is perverse. See also Kenya Breweries Limited v Godfrey Oduyo [2010] eKLR in which it was held that: “In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”

18. The duty of this court when dealing with appeals from the Small Claims Court under Section 38 of the Act is equivalent to that of the Court of Appeal when dealing with a matter on a second appeal. In **Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR** the Court of Appeal distinguished between matters of law and matters of fact as follows:

*“First, this is a second appeal. In a first appeal the appellate court is by law enjoined to revisit the evidence that was before the trial court and analyse it, evaluate it and come to its own independent conclusion. In other words, a first appeal is by way of a retrial and facts must be revisited and analysed a fresh, - see **Selle and Another vs. Associated Motor Boat Company Ltd and Others (1968) EA 123**. In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”*

19. Turning to the grounds of appeal, I have read and considered the Record of Appeal and respective submissions by the parties. The appeal is solely on the issue of jurisdiction of the Small Claims Court. In **Muvokanza Limited v Muri Mwaniki Thige & Kageni Llp & another (Environment & Land Case 120 of 2021) [2022] KEELC 2275** (KLR) (16 May 2022) the court stated following on the question of jurisdiction;

“8. In the instant suit the 1st and 2nd defendant has based his Preliminary Objection on the ground that this court lacks jurisdiction to hear and determine the Plaintiff’s suit. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case. It will not matter whether the facts of the Plaintiff’s case as outlined are true not because without Jurisdiction this court will not have any powers to determine the case. This is because in any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the court, the said court must down its tools...”

20. From the above, it is evident that the question of jurisdiction, as raised in the instant appeal, is clearly a question of law and therefore falls within the ambit of section 38 (1) of the Small Claims Court Act. Consequently, this Court has jurisdiction to entertain this appeal.

21. On jurisdiction of the Small Claims Court, Section 12 of the Act provides as follows:
- (1) *Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—*
 - (a) *a contract for sale and supply of goods or services;*
 - (b) *a contract relating to money held and received;*
 - (c) *liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;*
 - (d) *compensation for personal injuries; and*
 - (e) *set-off and counterclaim under any contract.*
 - (2) *Without prejudice to the generality of subsection (1), the Court may exercise any other civil jurisdiction as may be conferred under any other written law.*
 - (3) *The pecuniary jurisdiction of the Court shall be limited to one million shillings.*
 - (4) *Without prejudice to subsection (3), the Chief Justice may determine by notice in the Gazette such other pecuniary jurisdiction of the Court as the Chief Justice thinks fit.*
22. In coming to its determination on the Preliminary Objection, the trial court addressed itself to rent and rent arrears, which was the claim by the Respondent in its Counterclaim. However, the Appellant's claim was for breach of contract, relating to the rent deposit paid by the Appellant to the Respondent. In my view, the Appellant's claim falls squarely within the provisions of section 12 (1) (b) of the Act, being a contract for money held and received. It is, therefore, the finding of this Court that the trial court has requisite jurisdiction. I am guided by the decision in the case of ***Greenlife Crop Protection Africa Limited v Trovic Ventures Limited & 2 others (Civil Appeal E148 of 2023) [2023] KEHC 27359 (KLR)***.
23. Further, on the issue of the pecuniary jurisdiction raised by the Respondent, the provisions of section 12 (3) of the Act couldn't be any clearer. Additionally, the statutory form for lodging a claim binds the claimant to waive and forfeit the recovery of all sums in excess of Kshs 1 million. Being a pleading, this binds both the claimant and the Court.
24. In this instance, the Appellant's specific claim was for (i) punitive and exemplary damages under the Consumer Protection Act; and (ii) damages under contract for

the oppressive, high handed, outrageous, insolent and vindictive conduct. No specific amount is quoted in the prayers. It is only in the description of the nature of the claim that the Appellant quotes the figure of Kshs 800,000/=. It is settled law that an award of damages is discretionary. Therefore, the Appellant’s mere suggestion or argument that it is entitled to an award of Kshs 800,000/= does not bind the court to award the same. That being the case, this point of the preliminary objection is moot.

- 25. On that basis, I find that the trial court’s decision is marred by an incorrect exposition of the law and I, hereby, set it aside. The appeal succeeds and is allowed with costs to the Appellant assessed at Kshs 40,000/=. The matter to be heard and determined on merit before a different Adjudicator other than Hon. Caroline Okumu, Resident Magistrate.

Dated and Delivered at Nairobi this 23 day of JANUARY 2025.

**HELENE R. NAMISI
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

..... for the Appellant

..... for the Respondent

.Ms. Libertine Achieng Court Assistant