Hassan & another v Murungi (Environment and Land Appeal 35 of 2021) [2023] KEELC 16380 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16380 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 35 OF 2021

NA MATHEKA, J

MARCH 22, 2023

BETWEEN

SWALEH HASSAN ..... 1ST APPELLANT

ALI ATHMAN ..... 2ND APPELLANT

AND

JOSEPHINE MURUNGI ..... RESPONDENT

JUDGMENT

1 The Appellants herein being aggrieved and dissatisfied with the whole decision of Hon E Makori delivered on June 19, 2020 in Mombasa CMCC No 2090 of 2000 appeal to the Environment and Land Court against the whole of the said decision on the following grounds;

1. The Trial Court erred in law and in fact in holding that the claim filed by the Appellants ought to be determined pursuant to the Physical Planning Act yet the pleadings clearly demonstrate a claim for trespass seeking orders of injunction.
2. The trial court erred in law and in fact in holding that the court did not have jurisdiction to hear and determine the suit filed by the appellants yet the same was well within its requisite jurisdiction.
3. The trial court erred in law and in fact in upholding the respondent's preliminary objection raised twenty (20) years after commencement of the pleadings in which the respondent admitted the jurisdiction of the court.
4. The trial court erred in law and in fact in holding that the appellants had established a right that had been infringed by the respondent but proceeded to dismiss the appellants claim.
5. The trial court erred in that it did not hold the scales of justice and equity evenly as between the appellants and the respondent.

6. The trial court erred in law and in fact in that it delivered a judgment that was wholly against the weight of evidence and the applicable law.

The appellants pray;

a. The appeal herein be allowed and set aside the judgment delivered herein by Hon E Makori on June 19, 2020.

b. The court do review and substitute the judgement delivered herein with a judgment allowing the appellants' suit.

c. In the alternative, the court be pleased to order that this matter be heard afresh before any other magistrate other than the trial magistrate.

d. Costs of this appeal be awarded to the appellants.

e. Any other orders this honourable court may deem fit and just.

2 The 1st appellant herein filed the instant suit in his capacity as a co-administrator of the estate of Ali Bin Nguma who is also known as Ali Gona, together with the Co-Plaintiff the late Ali Athman. The plaintiff had obtained a grant of letters of administration from the High Court of Kenya vide probate and Administration Cause No 28 of 1992 which grant had been issued on the November 4, 1993 as evidence by PEXH-I. (See page 14 of the Record of Appeal). The Estate of the late Ali Bin Nguma who is also known as Ali Gona comprised of a property known as plot Number 172/11/MN. This is contained in the copy of the Certificate of Ownership produced as PEXH-2. The said property was subsequently subdivided amongst the beneficiaries to the estate of the late Ali Bin Nguma and amongst the subdivisions was Plot No 6827/11/MN the subject matter of the instant suit. The Appellants' testimony revealed that the Respondent was a Lessee of a neighboring property known as 6830/11/MN owned by Badi Hamisi. Sometime in the year 1999, the Respondent commenced illegal construction work on the Leased Property Plot No 6830/11/MN.

3 That the said construction began to encroach into the Appellants' property 6827/11/MN and the Appellants approached the Respondent to inform her of the trespass and advised her to desist. On realizing that the negotiations with the Respondent were futile, the Appellants resorted to seek redress from the Municipal Council of Mombasa. The officers carried out a survey of the area in dispute and on two separate occasions issued the Respondent with notices dated 16th April, 1999, and 18th February, produced as PEXH-3 and PEXH-4 respectively. The notices were to the effect that the constructions were illegal and had been built on beacons. That the Respondent did not challenge such notices nor the decision arising from the survey by the Municipal Council of Mombasa. Subsequently, the Appellants carried out a survey of the area and the survey report and map revealed that the Defendant had indeed trespassed into the Appellants' property taking up a substantive portion of the same. This is clearly indicated in the Topographical Survey Map on plot No 6827/11/MN and Plot No 6830/11/MN produced as PEXH-6. The Respondent still did not challenge the survey report in Court. Consequently, the trial court delivered its judgment on June 19, 2020, in which the court acknowledged the appellants' right over the suit property but strangely proceeded to dismiss the same.

4 That the trial court erred in law and in fact in holding that the appellants had established a right that had been infringed by the respondent but proceeded to dismiss the appellants' claim. it is their humble prayer that this honourable court set aside the trial court's judgment and grant the appellant the prayers as sought in their memorandum of appeal.

5 The respondents submitted that in page 5 of the record of appeal, it is said that plot 6827/11/MN is registered in the name of Ali Bin Nguma while in page 169 Swaleh Hassan Ali categorically stated that

the property belongs to Ali Gona and that therefore the name Ali Bin Nguma is a typographical error. With such a fundamental error it was incumbent upon the Appellants to apply for an amendment of the plaint so that they could correctly stand in the place of the owner of Plot No 6827/11/MN namely Ali Gona. The letters of Administration that the Appellants produced allowed them to represent the Estate of Ali Bin Nguma not Ali Gona who is said to be the owner of all that plot of land known as Plot 6827/11/MN.

6 In the circumstance, as the certificate of title of Plot No 6827/11/MN was not produced as an exhibit and in light of the evidence of the Appellants at page 169 it then clearly means that the Letters of Administration held by the Appellants for the estate of Ali Bin Nguma are of no relevance. Therefore, until the appellants obtain a rectification of the letters of administration to reflect that the appellants are appointed to represent the affairs of Ali Gona, then the appellants suit is clearly untenable. furthermore, even if trial court had jurisdiction (which trial court did not have jurisdiction) for this second reason the appellants suit is untenable and has no foundation. They submit that the Trial Court correctly analyzed and applied the law. It did not have any other alternative other than to strike out the suit for indeed without jurisdiction, the trial court had no choice but to strike out the said suit and to down its tools. For that the reason, they strongly oppose the appeal as filed and submit that is clearly unmeritorious. They therefore pray that this appeal be dismissed with costs to the respondent.

7 This court has considered the appeal and submissions therein. The preliminary issue to be determined in this matter is whether or not the trial magistrate had the jurisdiction in this matter. The trial magistrate held that the defendant floated the process under the physical planning act when he was notified not to do any further development and that further pursuit ought to have been followed under the act to bring down the building and establish the nature of the encroachment and hence the plaintiff's suit was dismissed. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court stated *in the Matter of Interim Independent Electoral Commission* (2011) eKLR as follows:

> (29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):
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> "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step."
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> [30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution."

8 Article 162(2) (b) of the *Constitution of Kenya, 2010* and at Section 13 of the *Environment and Land Court Act*, 2011. The said Section 13 provides as follows:

> 13. Jurisdiction of the court

(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the Court 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.

9 The judicial system in Kenya also includes the Magistrates' Courts as established under Article 169 of the *Constitution of Kenya, 2010*. Pursuant to Article 169 (2), parliament is mandated to enact legislation conferring jurisdiction, functions and powers on the Magistrates' Courts.

10 A few years after enactment of the *Environment and Land Court Act*, *2011*, parliament also enacted the *Magistrates' Courts Act*, *2015* so as to among others give effect to Articles 23 (2) and 169 (1) (a) and (2) of the *Constitution* and to confer jurisdiction, functions and powers on the Magistrates' Courts. The Act came into operation on January 2, 2016 and its Section 9 (a) provides:

A magistrate's court shall -

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

11 The upshot of the provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, 2015 is that magistrates who are duly gazetted and have

the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land.

12 That Section 38 of the *Act* provided for Enforcement Notice as follows;

> " 38. Enforcement notice
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> (1) When it comes to the notice of a local authority that the development of land has been or is being carried out...without the required development permission having been obtained, or that any of the conditions of a development permission granted... has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land.
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> (2) An enforcement notice shall specify the development alleged to have been carried out without development permission, or the conditions of the development permission alleged to have been contravened and such measures as may be required to be taken within the period specified in the notice...such enforcement notice may require the demolition or alteration of any building or works or the discontinuance of any use of land or the construction of any building or the carrying out of any other activities.
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> (3) Unless an appeal has been lodged under subsection (4), an enforcement notice shall take effect after the expiration of such period as may be specified in the notice.
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> (4) If a person on whom an enforcement notice has been served under subsection (1) is aggrieved by the notice, he may within the period specified in the notice appeal to the relevant liaison committee under Section 13.
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> (5) Any person who is aggrieved by a decision of the liaison committee may appeal against such decision to the National Liaison Committee under Section 15.
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> (6) An appeal against the decision of the National Liaison Committee may be made to the High Court in accordance with the rules of procedure for the time being applicable to the High Court.
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> (7) Any development affecting any land to which an enforcement notice relates shall be discontinued and execution of the enforcement notice shall be stayed pending determination of the appeal made under subsections (4), (5) or (6)."

13 Section 61 (3-4) of the *Physical and Land Use Planning Act 2019* provides that,

> An applicant or an interested party that is aggrieved by the decision of a county executive committee member regarding an application for development permission may appeal against that decision to the County Physical and Land Use Planning Liaison Committee within fourteen days of the decision by the county executive committee member and that committee shall hear and determine the appeal within fourteen days of the appeal being filed.
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> An applicant or an interested party who files an appeal under sub-section (3) and who is aggrieved by the decision of the committee may appeal against that decision to the Environment and Land Court.

14 The Court takes judicial notice that as at June 19, 2020 the Liaison Committee had not been established and was not operational. Section 93 of the same *Act* provides that where the Liaison

Committee has not been established, the Court has jurisdiction. That all disputes relating to physical and land use planning, before establishment of the National and County physical and land use planning liaison committees shall be heard and determined by the Environment and Land Court. I find that the Appellant was right to pursue redress in the said court and their matter appears to be one of trespass. I find that the Trial Court erred in law and in fact in holding that the claim filed by the Appellants ought to be determined pursuant to the *Physical Planning Act* as this is a claim for trespass seeking orders of injunction. I also find that the Trial Court erred in law and in fact in holding that the Appellants had established a right that had been infringed by the respondent but proceeded to dismiss the appellants claim stating that the plaintiff was the sole witness and no expert witness was called to establish the extent of encroachment and yet the survey plan was produced in court as evidence PEx6. For these reasons I find that the appeal is merited and I grant the following orders;

1. The appeal herein be allowed and set aside the judgment delivered herein by Hon. E. Makori on June 19, 2020.
2. That this matter be heard afresh before any other Magistrate.
3. Costs of this appeal be awarded to the appellants.

15 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE