



**Kamira v Kiarie (Suing as the administrator of the Estate of Joseph Wanyoike Kiarie (Deceased) & 2 others (Civil Appeal E16 of 2020) [2023] KEHC 1284 (KLR) (27 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 1284 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL E16 OF 2020  
DKN MAGARE, J  
JANUARY 27, 2023**

**BETWEEN**

**JOHNSTONE KIARIE KAMIRA ..... APPELLANT**

**AND**

**JOYCE GATHONI KIARIE (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF JOSEPH WANYOIKE KIARIE (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**TIMOI FARMS & ESTATES LTD ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR NAKURU ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This matter came before me on January 25, 2023 for notice to show cause as to why the same should not be dismissed for want to prosecution. When enquired on the cause of action, I was informed that the same is an appeal from the Eton R Yator in Molo Chief Magistrate land case No 45 of 2018 delivered on November 5, 2020.
2. The dispute related to the issue of the title over land which the parties were disputing over title, ownership and possession. The court had found in favour of the 1<sup>st</sup> respondent as an owner of the suit land. The title number of the suit land is not indicated in the memorandum of appeal.
3. Whatever the dispute the parties had, the same clearly over ownership, possession and title to land. The dispute therefore falls within the jurisdiction of one of the courts contemplated in article 162(2) of the *Constitution*. Article 162 (2) provides as follows

“162(2) parliament shall establish court with the states of the High Court to hear and determine disputes relating to;-

(a) ....



- (b) The environment and the use and occupation of title to land.”
4. The courts contemplated under article 162(2) b are established under section 4 of the *Environment and Land Court Act* No 19 of 2011. They have jurisdiction circumscribed under the section 13(2), of the said act which provides as doth :-
    - (a) 2) In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the court shall have power to hear and determine disputes——
      - b. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
      - c. relating to compulsory acquisition of land;
      - d. relating to land administration and management;
      - e. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
      - f. any other dispute relating to environment and land.
  5. It is also noted that this matter proceeded in the subordinate court as a land case, that is, a matter dealing with the possession, ownership and title to land. The appeal was then preferred to this court.
  6. On the other hand, the jurisdiction of this court is subscribed in article 165 of the *Constitution*. The court is said to have unlimited original jurisdiction in Criminal and civil matters. The High Court, under article 165 3(b) has jurisdiction to determine whether a right of a fundamental freedom of a bill of rights has been violated, infringed or threatened.
  7. However, by dint of article 165 (5) this court does not have Jurisdiction over matters:-
    - a. reserved for the exclusive jurisdiction of the Supreme Court.
    - b. Falling within the jurisdiction of courts contemplated in article 162(2) of the *Constitution*.
  8. Before proceeding with the matter either on merit or addressing the issue whether the appeal should be dismissed for want of prosecution, court was duty bound to satisfy itself that it has both the subject matter jurisdiction and jurisdiction over the parties.
  9. The issue of jurisdiction cannot be conferred by parties or imagined. The court either has jurisdiction or it does not. jurisdiction is dealt with in a manner of a preliminary objection.
  10. In a scenario of an appeal, the grounds of appeal and the prayers sought form the basis for jurisdiction. It is not based on some predominant issue or craft by parties.
  11. It is simple terms jurisdiction is determined from the subject matter of the appeal. This is the core dispute the court is required to determine and render itself at the end of the day. This is what people in the streets classify the matter to be about. What are parties disputing about. It real does not matter how the same is clothed in exotic king’s language, with a little sprinkling of a dead language, known only to lawyers and clergy, latin.
  12. The core jurisdiction giving material comes from that one issue, which, if determined against the claimant, everything else falls. In this matter the claimant gave a terse response to the question of what the main prayers were. He retorted ‘to cancel a fake title over the appellant’s land’.



13. This means that there has to be an enquiry as to the genuineness of title held by the 1<sup>st</sup> respondent. If the appellant is to succeed, an order will be issued to cancel the title and for the 3<sup>rd</sup> respondent to issue a proper title.
14. In other words, it is taken as if the position of the appellant were correct, without looking at any possible response or merits of the response. The result is establishment of the subject matter, which is basis for jurisdiction. The subject matter should be established without arguments or elaborate machinations. It should come out of pleadings. Like an elephant, you will see jurisdiction, when there is one and will not see where there isn't. Whether you explain what it meant by jurisdiction is a different matter.
15. The jurisdiction of that court is set out in section 13 (2) (d) of the said Act which include powers to hear and determine disputes relating to public, private and community law and contracts choses in action of other instruments grants any enforceable interests in law. To my knowledge title and title deeds grant an "enforceable interest in land."
16. There is no dispute as contemplated under article 165 (5) for this court to hear this dispute.
17. In this context, the is clearly on title to land. This court is not permitted to proceed and determine title to land. The ELC court has both original and appellate jurisdiction to deal with that matter. The court therefore lacks jurisdiction to handle this appeal.
18. The long and short of the foregoing is that this appeal by its very nature is a land dispute. It therefore serves no useful purpose to enquire whether the appellant had filed a requisite record of appeal.
19. Having determined that this is a matter involving land as contemplated under article 162 (2) b of the Constitution. I find that this court has no jurisdiction and as such the court is bound to down tools.
20. The question then is what to do with the appeal before me. there is an argument that this court has jurisdiction to transfer the petition in ELC for hearing and determine determination. I do not think so.
21. I agree with Hon Justice D S Majanja in Kenya Red Cross Society Ltd v Kennedy Arani Bende (2022) eKLR where he posited
 

“Since the appeal was filed in a court without jurisdiction, it cannot be said by transfer to ELRC. It can only be struck out.”
22. Transfer can only arise where, the two courts have concurrent jurisdiction in some matters and this court finds or the courts of equal status find that the predominant question is in one court and not the other.
23. However, in scenarios, like this matters, where all issues are related to or arise from land and there is no question for determination outside land, then the subject matter determines jurisdiction *ratione materiae*, that is land.
24. The court of appeal Owners of Motor Vehicle Vessel “Lilians v Caltex Oil (Kenya) Ltd (1989)eKLR , Nyarangi JA as then he was, held as follows: “Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds, the opinion that it is without jurisdiction.”
25. Jurisdiction is an authority to make decision which arises from statutory or constitutional imperatives. In this case, jurisdiction is circumscribed by the Constitution itself and as such there is no authority to do anything further. You either have it or you don't. there are no two ways about it.



26. It has been suggested that the Supreme Court allowed life to be breathed into a nullity in *Mike Mbuvi Sonko v the Speaker of the County Assembly of Nairobi* (2022)eKLR. Nothing is further from the position. In that case the court found it had no jurisdiction to deal with issues raised in the petition. Nevertheless, they gave jurisprudential guidance on certain aspects as the highest court in the land.
27. In *Macharia & another v KCB & 2 others* the court stated as follows: - “ a courts jurisdiction flows from either the *Constitution* or legislation or both. Thus a court can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. ...where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature will be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”
28. In the circumstances the issue of jurisdiction cannot be gain said. As earlier alluded I have perused the record and there is no issue of predominance. The issue of predominance was dealt with in *Mohammed Ali Baadi & others v AG & 11 others* (2018) eKLR where the court relied at paragraph 105 where the court dealt with mixed issues, capable of being in either courts as doth:-
- “ the courts have resolved the issue by requiring what most substantial question or issue is.”
29. In *Patrick Musimba v National Land Commission & 4 others* and stated, succinctly as doth:-
- “It could not have been the intention of the draftsman of the *Constitution* that when the court was faced with a mixture of causes of action touching on the *Constitution*, especially on fundamental rights a separationistic approach was to be adopted by the court and have the claim dispatched to one court and the other half was retained.”
30. The best approach is to determine whether the predominant purpose falls within the High Court or courts of equal status and from pleadings when hybrid questions are raised, they are then sent to a court with the predominant question.
31. Where there is no mixture of questions outside land questions of title, possession and ownership of land, the appeal is incapable of being salvaged.
32. Odunga J, in *Wambua v Kamondia & 3 others* (2022) IKEHC 10426 KLR) noted that:-
- “ there are two types of jurisdictional questions. The first one is where a court has no jurisdiction to embark on investigation into a matter. in such a case, there is nothing to be transferred. The second one where the court has jurisdiction at the inception which is affected subsequently, the later can be transferred.
33. Having fallen within the former, the appeal herein is struck out with costs for lack of jurisdiction. It is filed in a wrong forum and cannot be salvaged.
34. The foregoing sets forth the procedure to take when the court has no jurisdiction. As state in *S.K Macharia* (Supra) this court cannot confer on itself jurisdiction by craft or interpretation or innovation.
35. Accordingly, the appeal herein is hereby struck out with costs to the 1<sup>st</sup> respondent.



36. Regarding the 2<sup>nd</sup> respondent, they supported the appeal. They are not entitled to costs.
37. The power of this court is circumscribed in section 27 of the Civil Procedure Act, which provides as doth: -

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

38. Therefore, from the standpoint of law, costs are at the discretion of the court that decides the case. Not unlike any other discretion, the discretion on costs has to be judicious and not capriciously, whimsically or arbitrarily.
39. The first respondent has succeeded in the suit and as such may only be deprived wholly or partially of the costs of the action for a good reason. I have not seen any reason. I therefore award costs to the 1<sup>st</sup> respondent payable by the appellant. Given the minimum activities in this file, I award costs of Ksh 35,000/= payable to the 1<sup>st</sup> respondent. The same are payable within 30 days failing which execution do issue.

**DATED, DELIVERED AND SIGNED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF JANUARY, 2023**

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, NAIROBI**

**Delivered virtually in the presence of;**

No appearance .....for the Appellant.

No appearance for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Miss .....for the 2<sup>nd</sup> Respondent/Respondent.

Nancy Bor, Court Assistant.

