



REPUBLIC OF KENYA



KENYA LAW
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**Wato v Kamaku (Civil Appeal 19 of 2021)
[2023] KEHC 21997 (KLR) (31 August 2023) (Judgment)**

Neutral citation: [2023] KEHC 21997 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 19 OF 2021
AK NDUNG’U, J
AUGUST 31, 2023**

BETWEEN

CHITI TSUMA WATO APPELLANT

AND

RAPHAEL NAMAI KAMAKU RESPONDENT

*(Being an Appeal from the Ruling and Order of N.C Adalo Senior Resident
Magistrate, at Mariakani dated and delivered on the 2nd March, 2021
in the Senior Principal Magistrate’s Court Civil Suit No.11 of 2015)*

JUDGMENT

CORAM: Hon. Justice A.K.Ndung’u

Mr Tindika for the Appellant

Ms Musyoki for the Respondent

1. At the trial court, the Appellant by way of a Notice of Motion dated October 26, 2020, sought Orders from the trial Court that the Court be pleased to set aside and/or vacate the order/or ruling made on October 8, 2019 dismissing the then Plaintiff’s suit on grounds of want of prosecution and all the consequential orders and/or steps taken thereupon be vacated in their entirety.
2. The record shows that the said application was opposed by the Defendant/Respondent vide a replying affidavit sworn by himself on January 7, 2021.
3. The matter was canvassed by way of written submissions and in a ruling dated March 2, 2021 the application was dismissed with costs to the Defendant.



4. Aggrieved by the said ruling, the Appellant has lodged this appeal against the ruling/ order of the trial court raising 8 grounds namely; -
- a. That the Learned Magistrate erred in fact and in law by failing to address the Application before her by the Appellant, which was seeking to set aside orders which had been made ex-parte and without service upon the Appellant.
 - b. That the Learned Magistrate misdirected herself in failing to address the issue which was before her.
 - c. That the Learned Magistrate erred in law and in fact in addressing issues which was not before her and that regard using the said misdirection in reaching at a decision which was unfounded in law.
 - d. That the Learned Magistrate erred in fact and in law by failing to consider the Appellant's position that he was not served with the Notice of Motion Application dated July 21, 2019, which was the issue that was before her.
 - e. That the Learned Magistrate misdirected herself by adopting the position put forth by the Respondent and thus utilized the same to reach an unbalanced and biased decision.
 - f. That the Learned Magistrate erred in Law and in fact in finding that the Appellant's Notice of Motion dated the October 26, 2020 lacked merit and in dismissing the same with costs to the Defendant/Respondent.
 - g. That the Learned Magistrate misdirected herself by taking a partisan position which effectively made him to arrive at a decision which was bad in law ab initio.
 - h. That the Learned Magistrate erred in law and in fact in reaching a decision which was tantamount to denying the Appellant access to justice and participation in the full hearing and determination of his case herein and thus of his effectively breaching the Appellant's constitutional right to fair trial.
5. The appeal was canvassed by way of written submissions.
6. This being a first appeal my duty is well set out as laid down in *Selle and Another V Associated Motor Boat Company Limited and Others* (1968) EA 123, where the Court stated; -
- “.....this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence.....”
7. In a nutshell, the subject application before the trial court sought the setting aside of a dismissal order dated October 8, 2019 in respect of Civil Suit No 11 of 2015 at the Mariakani Magistrate's court, an order obtained by Defendant (Respondent herein) vide their application to court dated June 21, 2019.
8. It has been contended by the Appellant (then Plaintiff) that the Notice of Motion dated June 21, 2019 was never served on them. The alleged service is challenged on the basis that a chief is not authorized



to effect service and in any event no document was ever received from the chief. It is urged that the law requires a party to be served before adverse steps are taken against them, thus the Appellant was greatly prejudiced by the orders issued.

9. The Respondent contended at the trial court that the Appellant was served by a licensed process server by the name Michael Muthika William as seen in his affidavit sworn on July 20, 2019 where it is indicated that service was effected on July 12, 2019. It is urged that the Appellant did not meet the legal threshold for setting aside of the Court's Orders.
10. I have considered the factual material laid before the trial court and re-evaluated it. In the course of so doing, I have noted an aspect of this appeal that has not been raised nor addressed by any of the parties, a strange occurrence given that the same touches on the jurisdiction of this court.
11. The Appellant approached the trial court vide a Plaint dated January 29, 2015 and filed on the same date. A cursory look at the Plaint shows clearly that this is a claim over ownership of land. It revolves around ownership of some unsurveyed ancestral parcel of land measuring approximately five acres which formerly belonged to the Appellant's grandfather, the late Samuel Kadzoyo Nyamu.
12. By dint of Article 162 2 (b) and the provisions in the *Environment and Land Court Act*, the dispute herein falls within the jurisdiction of the Environment and Land Court.
13. The Court of Appeal in Nakuru Civil Appeal No 119 of 2017, *Public Service Commission and 2 Others v Eric Cheruyoit & 2 Others* discussed jurisdiction and its importance as follows; -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows: -

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

37. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA



relying, inter alia, on the above cited treatise by John Beecroft Saunders 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

14. Section 13 of the [Environment and Land Court Act](#) outlines the Environment and Land Court’s jurisdiction as follows; -

“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. [Rev. 2012] No 19 of 2011 Environment and Land Court 9 [Issue 1] (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. (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court. (5) Deleted by Act No 12 of 2012, Sch. (6) Deleted by Act No 12 of 2012, Sch. (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including— (a) interim or permanent preservation orders including injunctions; (b) prerogative orders; (c) award of damages; (d) compensation; (e) specific performance; (g) restitution; (h) declaration; or (i) costs.

15. In Petition No 5 of 2015, [Republic v Karisa Chengo and Others](#) 2017 eKLR, the Supreme Court rendered itself thus;

“[50] It is against the above background, that Article 162(1) categorizes the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialized Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the



subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words:-

By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The Constitution though does not define the word 'status'. The intentions of the framers of the Constitution in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.”

16. It flows from the foregoing that this Court has no jurisdiction to entertain this Appeal. The same was filed in the improper Court and this Court cannot move a step further in the matter and neither is it conferred with jurisdiction to transfer a matter in which, *ab initio*, it had no jurisdiction.
17. Consequently, the Appeal herein is struck out for want of jurisdiction.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 31st DAY OF AUGUST, 2023.

.....

A.K. NDUNG’U KIMANI

JUDGE

In the Presence of; -

