



REPUBLIC OF KENYA



Mugo v Mbogo (Civil Appeal 74 of 2019) [2023] KEHC 21817 (KLR) (9 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 74 OF 2019
LM NJUGUNA, J
AUGUST 9, 2023**

BETWEEN

BERNARD MUNYI MUGO APPELLANT

AND

ENID IGONJI MBOGO RESPONDENT

RULING

1. The appellant/applicant filed notice of motion dated June 16, 2022 together with the supporting affidavit thereof, seeking orders that:
 - a. The respondent, her children, servants, agents or anyone claiming through her be evicted from the suit land herein Gatari/Nembure/2069 and its resultant subdivision by Ms. Quickline Auctioneers and that OCS Runyenjes Police Station to supervise and provide security during the eviction; and
 - b. The costs of this application be borne by the respondent.
2. The application was premised on the grounds that:
 - a. The respondent has failed, ignored, neglected to freely move out of the suit land despite numerous demands;
 - b. The applicant is entitled to enjoy the fruits of his judgement;
 - c. The respondent should move to her land; and
 - d. The respondent has disobeyed orders of this court.

It was the appellant/applicant's case that the rights of the respondent over the suit land had been extinguished following determination of the appeal.



3. The respondent filed a replying affidavit terming the application as a non-starter and devoid of merit because the appellate court lacks jurisdiction to make the orders sought. That the decree sought to be executed emanates from Runyenjes Magistrate's in Succession Cause No 141 of 2017 and not from this appellate court.
4. The court directed that the application be dispensed with by way of written submissions and both parties complied.
5. It was the applicant's submission that the respondent has brought up the issue of jurisdiction as a diversion and that this court has proper jurisdiction under section 78(2) of the *Civil Procedure Act*. The applicant stated that the respondent is wasting judicial time by challenging the jurisdiction of this court and in saying this, he relied on Article 159 of the Constitution of Kenya 2010, and Section 1A of the *Civil Procedure Act*.
6. In her submissions, the respondent stated that the matter herein was heard by this court in its capacity as an appellate court and not as a court of first instance under Section 78(a) of the *Civil Procedure Act*. That after issuance of the judgment on the matter on appeal herein it became functus officio and lacks jurisdiction to issue orders executing judgment of the court of first instance. On this, she relied on the similar case of *In re Estate of Mbogo Kauma (Deceased)* (Civil Appeal 82 of 2019) [2022] KEHC 16131 (KLR) which was decided by this court.
7. From perusing the application and its supporting affidavit, the replying affidavit and submissions, it is clear to me that the issue for determination is whether this court has power to issue the orders prayed for by the applicant. However, an issue of greater priority has been raised by the respondent and that is, the issue of jurisdiction. It is paramount that this issue be addressed first and then the court will find bearing on the other issues raised in the application.
8. Previous courts have taken strong sentiments on the issue of jurisdiction because without it, the court exercises a nullity. I choose to be guided by the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR where the court held:

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

9. The applicant stated that the court indeed is clothed with jurisdiction to issue the orders sought as provided by section 78(2) of the *Civil Procedure Act* which provides that:

“(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

I also note that jurisdiction of the High Court in succession matters is entrenched in section 47 of the *Law of Succession Act* as follows:

“The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:



Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.”

10. The respondent submitted that the applicant was shielding himself using the argument on jurisdiction and thereby abusing the court process. I disagree with this notion that jurisdiction is a trivial matter. In my view, the issue of jurisdiction cannot be trivialized and must be addressed where the slightest doubt arises. The court held this position in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR where the Supreme Court held;

“A court’s jurisdiction flows from either constitution or legislation or both. Thus, a court of law 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. We agree with counsel for the 1st and 2nd respondents in their submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it; is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”
11. Article 165(2)(a) and (e) confers the High Court with unlimited original jurisdiction in civil and criminal matters and any other original and appellate jurisdiction as defined in legislation. Consequently, Section 78 of the *Civil Procedure Act* and section 47 of the *Law of Succession Act* provide for the powers of the High Court sitting as an appellate court and original jurisdiction respectively. The latter further provides that the High Court in exercising its jurisdiction may be represented by a Resident Magistrates court.
12. In this case, the high court’s appellate jurisdiction was invoked. The decree in question rightfully emanated from the Runyenjes Magistrate’s court. In addition, when the matter was lodged on appeal in the High Court, it was determined under the high court’s powers conferred under section 78(a) of the *Civil Procedure Act* and after delivery of the judgment it became *functus officio*, having rightfully completed its role as an appellate court.
13. It is, therefore, my view that this court is not clothed with proper jurisdiction to entertain the application and issue the orders herein. That the same may be re-directed to the lower court from which the decree arose. It then follows that this court will not be able to grant the orders as prayed as it lacks capacity to do so.
14. The application is therefore struck out for want of jurisdiction, with no order as to costs.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF AUGUST, 2023.

L. NJUGUNA

JUDGE

