



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abeid & another v Osman (Civil Appeal 203 of 2019)  
[2022] KEHC 17059 (KLR) (31 March 2022) (Judgment)**

Neutral citation: [2022] KEHC 17059 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 203 OF 2019**

**MN MWANGI, J  
MARCH 31, 2022**

**BETWEEN**

**SADUN ABEID ..... 1<sup>ST</sup> APPELLANT**

**FATUMA ABEID ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MOHAMED AYUB SULEIMAN OSMAN ..... RESPONDENT**

*(Being an Appeal from the ruling of Hon. C.N Ndegwa, Principal Magistrate, delivered on 14th October, 2019, in Mombasa Chief Magistrate's Court Civil Case No. 701 of 2016)*

**JUDGMENT**

1. The suit against the appellants in the lower Court was that the respondent is the registered proprietor of land known as Title Number Mombasa/Block XVII/201 within Mombasa Island. The respondent averred that since about March 20, 2016, the appellants commenced putting up a permanent building on plot number 1013 where there was in existence an old dilapidated and abandoned structure, and that the said permanent building has encroached on the suit property and blocked the only access to the said property from the main road, hence the construction of the permanent building will completely hinder the respondent from accessing and developing the suit property.
2. The suit was filed contemporaneously with a Notice of Motion application dated August 11, 2016 under certificate of urgency, where the respondent sought a temporary injunction restraining the appellants from constructing or developing or continuing to construct or develop on plot number 1013 and from blocking or continuing to block the access to, or encroaching on plot No Mombasa/Block XVII/201 or in any manner interfering with the plaintiff's occupation thereon, pending the hearing and determination of the said application and of the suit herein.
3. On August 30, 2018 the appellants filed a replying affidavit to the application dated August 11, 2016 where they deposed that they are the registered absolute proprietors of land reference No Mombasa/



Block XVII/1013 in Mombasa which they bought for valuable consideration from the previous owner, Ibrahim Gulamhussein, and that they had commenced construction and improvement of the structure erected thereon. They denied that the said development and/or improvement had encroached on the respondent's property or blocked the access road to the said property.

4. On April 12, 2016, the Trial Magistrate issued an order of temporary injunction, restraining the appellants from constructing or developing or continuing to construct or develop on plot number 1013 and from blocking or continuing to block the access to, or encroaching on plot No Mombasa/Block XVII/201 or in any manner interfering with the respondent's occupation thereon, pending the hearing of the said application. The said orders were confirmed in a ruling that was delivered on March 14, 2019.
5. On June 21, 2019, the respondent filed a Notice of Motion application dated June 20, 2019, where it sought an order for committal of the appellants to prison for a period of six months or such other period as the Court may deem fit and just. He also prayed for the suit property to be attached for disobedience of the Court order made on April 12, 2016 and confirmed on March 14, 2019.
6. The appellants in opposition to the said application filed a replying affidavit on July 12, 2019 sworn on the same day by Sadum Abeid, the 1<sup>st</sup> appellant herein, who deposed that since the initial order of the Court, they had neither constructed nor developed their property in such a manner that it had either encroached and/or blocked the access road to the respondent's premises and that they had not disobeyed the orders that were issued by the Court.
7. In the lower Court, a ruling was delivered on October 14, 2019, where the Court found that the appellants were guilty of contempt of Court and issued warrants of arrest against them. The Trial Magistrate directed that he would determine the appropriate punishment to be meted out once the appellants were arrested and brought before Court.
8. The appellants being dissatisfied by the decision of the Trial Magistrate, filed a Memorandum of Appeal on October 16, 2019, raising the following grounds of appeal-
  - i. That the Honourable Magistrate erred in law and fact in holding that contempt was proved;
  - ii. That the Honourable Magistrate erred in law and fact in convicting the appellants for contempt and issuing warrants for their arrest without satisfying himself;
  - iii. That the Honourable Magistrate erred in law and fact in reaching the conclusion that there was contempt of orders of the Court by the appellants before considering the merits or otherwise of the application;
  - iv. That the Honourable Magistrate erred in law and fact in failing to determine the admissibility or otherwise of the plaintiff's electronic evidence despite the same having been challenged by the appellants;
  - v. That the Honourable Magistrate erred in law and fact in allowing inadmissible evidence in the form of photographs produced by the plaintiff/respondent without production of a certificate contrary to section 106B of the Evidence Act;
  - vi. That the Honourable Magistrate erred in law and fact in considering the photographic evidence produced by the plaintiff/respondent without satisfying himself of their (sic) authenticity;
  - vii. That the Honourable Magistrate erred in law and fact in allowing the respondent's application without even considering the appellants' affidavit evidence and submissions;



- viii. That the Honourable Magistrate erred in law and fact in convicting the appellants for contempt without considering the evidence tendered in the appellants' replying affidavit sworn on July 12, 2019 and the submissions dated September 5, 2019;
  - ix. That the Honourable Magistrate erred in law and fact in failing to accord the appellant the right to fair trial and hearing by failing to take into consideration at all the evidence and the submissions by the appellant;
  - x. That the Honourable Judge (sic) erred in law and fact by disregarding the evidence tendered by the appellants that the photographic evidence attached by the respondents were forgeries, fraudulent and cooked up;
  - xi. That the Honourable Judge (sic) erred in law and fact by ignoring and disregarding evidence that the plaintiff's application was a clear abuse of the Court process in that it was seeking to evict using a restraining order other than a mandatory order;
  - xii. That the Honourable Magistrate erred in law and fact in failing to scrupulously follow and observe each stage and step of the procedure required in contempt proceedings as held in Court of Appeal in *Woburn Estate Limited v Margaret Bashforth* [2016] eKLR;
  - xiii. That the Honourable Magistrate erred in law and fact in convicting the appellants for contempt without considering and applying the laws and principles applicable in contempt proceedings;
  - xiv. That the Honourable Magistrate in considering the application for contempt, failed to consider whether the respondent had met the required standard of proof threshold in contempt proceedings; and
  - xv. That the Honourable Magistrate erred in law and fact in convicting the appellants for contempt despite there being no proof of them being in contempt of the orders issued on 12<sup>th</sup> April, 2016.
9. The appellant's prayer is for this appeal to be allowed with costs, the decision of the Honourable Magistrate to be varied, the orders issued on October 14, 2019 to be set aside in their entirety and for costs of the application to be awarded to the appellants.
  10. The appeal herein was canvassed by way of written submissions. On April 30, 2020, the law firm of Khalid Salim & Company Advocates filed written submissions on behalf of the appellants, while the respondent's submissions were filed on June 10, 2020 by the law firm of Mwakireti & Asige Advocates.
  11. Mr Khalid, learned Counsel for the appellants submitted that the photographs annexed to the respondent's affidavit in support of his application for contempt failed to comply with the express provisions of the *Evidence Act*, thus the Trial Court ought to have expunged them from the record. He submitted that for electronic evidence to be admissible as evidence in Court, it ought to comply with the mandatory provisions of Section 106 of the *Evidence Act*.
  12. He referred to the case of *William Odhiambo Oduol v Independent Electoral & Boundaries Commission & 2 others* [2013] eKLR, where Justice Muchelule while dealing with admissibility of electronic evidence cited the case of *Republic v Barisa Wayu Mutuguda* [2011] eKLR, where it was held that any information stored in a computer which is then printed or copied shall be treated just like documentary evidence and will be admissible as evidence without the production of the original and that Section 106B provides that such electronic evidence will only be admissible if the conditions laid out in the said provisions are satisfied.



13. It was submitted by Mr Khalid that the Trial Magistrate never satisfied himself on the identity of the person who took the photos, where they were taken, by what means they were captured, where they were captured, how they were printed, who printed the same, the functionality of the machines used to print or copy the photos among other requirements. He also submitted that there was no certificate accompanying the photos under Section 106B(4) of the Evidence Act. He stated that the said photographs were inadmissible.
14. In citing the case of K. Mutikika v Baliamin Farm Ltd [1985] KLR 27, he submitted that in contempt proceedings, proof must be made beyond the standard in civil cases as contempt is quasi criminal in nature and the burden of proof lies on the applicant. Mr Khalid submitted that the respondent failed to prove that acts of contempt allegedly committed by the appellants to the required standard since his application did not state clearly what alleged acts of contempt were committed by the appellants.
15. The appellants' Counsel indicated that the Trial Court in its ruling never stated how or why it had found the appellants guilty of contempt. He relied on the case of Woburn Estate Limited v Margaret Bashforth [2016] eKLR, where the Court held that in an application for contempt, the Court must satisfy itself that; the Court where the application has been filed has jurisdiction to punish for violation of its orders; that the person in question is in abuse/violation of the orders; and that the orders were served on the person accused of contempt, except where such person was present when the orders were issued. Mr Khalid submitted that the Trial Magistrate never satisfied himself that any of the above conditions were met by the respondent.
16. Mr Khalid contended that the Trial Magistrate in his ruling failed to analyze the appellants' evidence as stated in the replying affidavit and their submissions, and all that was indicated was that the appellants were guilty of contempt. He submitted that this goes against the principles of natural justice and Article 50(1) of the Constitution which grants all parties to a suit the right to a fair hearing.
17. Mr Asige, learned Counsel for the respondent relied on the provisions of Order 42 Rule 13(4)(f) of the Civil Procedure, Rules, 2010 and submitted that the appeal herein is incompetent as the appellants had failed to exhibit the ruling and the order from which the appeal arises. He urged the Court not to indulge the appellants for failure to attach the Court proceedings/notes that the Trial Magistrate made at the hearing, draft ruling and the order from which this appeal arises.
18. Mr Asige submitted that Order 42 Rule 13(4)(f)(ii) of the Civil Procedure Rules, 2010 provides that the Court can dispense with the production of some of the documents to be produced if they are not relevant except the Memorandum of Appeal, the pleadings in the Trial Court and the Judgment, order or decree appealed from. In light of the foregoing, he argued that the appeal herein should be struck out and dismissed with costs as the same is incompetent.
19. He referred to the case of Ruth Anyolo v Agnetta Oyiela Muyeshi [2019] eKLR, where the Court relied on the Supreme Court's decision in Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others [2015] eKLR, where it was held that without a Record of Appeal, a Court cannot determine the appeal cause before it thus if the requisite bundle of documents is omitted, the appeal is incompetent and defective for failing the requirements of the law and an incompetent appeal divests the Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.
20. It was submitted by Mr Asige that this Court lacks proper jurisdiction to hear and determine this appeal. He relied on Section 13 of the Environment and Land Court Act which gives the jurisdiction of the Environment and Land Court. He further submitted that the subject matter of the suit herein relates to land and as such the proper Court where this appeal should have been filed was the Environment and Land Court. He prayed for the appeal herein to be dismissed.



21. Mr Asige further submitted that the appellants' allegation that the photographs annexed to the respondent's replying affidavit dated November 27, 2019 were inadmissible is baseless. He relied on the provisions of Order 19 Rule 2 of the *Civil Procedure Rules, 2010*, and submitted that the appellants did not challenge the admissibility of the said photographs neither did they make an application to have the Court order cross-examination of the deponent to ascertain the authenticity of the photographs. He stated that the appellants did not produce photographs to challenge the respondent's photographic evidence in order to give the Court an opportunity to verify whether there was indeed contempt of Court on their part.
22. He indicated that the suit herein is civil in nature and matters of production of a certificate as alleged by the appellants does not hold water. He submitted that the Trial Magistrate relied on the evidence of the photographs and a letter from the Physical Planning Officer dated January 17, 2019 in reaching a conclusion that the appellants were guilty of contempt.
23. Mr Asige submitted that the Trial Magistrate considered all the evidence produced by the parties in support and against the application herein, as seen from his ruling where he stated that the defendants had filed a replying affidavit that was sworn by the 1<sup>st</sup> defendant Sadun Abeid on July 12, 2019. Mr Asige therefore stated that the allegation that the learned Trial Magistrate erred in law and fact in reaching the conclusion that there was contempt of the orders of the Court by the appellants without considering the appellants' evidence was an afterthought on the part of the appellants, calculated at misdirecting this Honourable Court.

#### **Analysis and determination.**

24. I have re-examined the entire Record of Appeal and given due consideration to the written submissions by the parties' respective Counsel. This Court being the 1st appellate Court has a duty to analyze and re-evaluate the evidence adduced before the lower Court and reach its own independent conclusion, while bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. This was the position held by the Court in *Selle & another v Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the Court held as hereunder-

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

25. The issues that arise for determination by this Court are as follows-
  - i. Whether this Court has jurisdiction to hear and determine this appeal; and
  - ii. Whether the appeal herein is merited.

Whether this Court has jurisdiction to hear and determine this appeal.

26. It is trite that jurisdiction lies at the innermost core in the exercise of the Court's power in determination of disputes. This position was restated by the Court of Appeal in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR in the following words-

“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.”

27. The respondent herein submitted that the subject matter of the suit relates to land and as such, the proper Court where this appeal should have been filed was in the Environment and Land Court. I have looked at the plaint dated April 11, 2016 and found that the respondent sought a declaration that Plot number 1013 is on a road reserve and no buildings, permanent or otherwise can be constructed thereon and prayed for the appellants to be ordered to demolish the structures; an order of permanent injunction restraining the appellants from constructing or developing or continuing to construct or develop on plot number 1013 and from blocking or continuing to block the access to, or encroaching on plot No Mombasa/Block XVII/201 or in any manner interfering with the respondent’s occupation thereon, among other orders.
28. I have also looked at the order that was issued on March 15, 2019 which was the subject of the contempt proceedings before the Trial Court and found that the Trial Magistrate granted a temporary injunction restraining the appellants, whether by themselves, their servants, agents, employees, family members or otherwise howsoever from constructing or developing or continuing to construct or develop on plot number 1013 and from blocking or continuing to block the access to, or encroaching on plot No Mombasa/Block XVII/201 or in any manner interfering with the respondent’s occupation thereon, pending the hearing and determination of the suit.
29. Section 13 of the *Environment and Land Court Act* No 19 of 2011 provides as hereunder:
- “ 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.
  2. 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*.
  3. 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.”



30. It is my considered opinion that in light of the broad jurisdictional framework set out in Article 162 of the Constitution, 2010 and Section 13 of the *Environment and Land Court Act*, the subject matter of the suit before the Trial Court and the appeal herein falls within the ambit of Section 13 of the *Environment and Land Act*. I agree with Counsel for the respondent that this Court lacks jurisdiction to hear and determine the appeal herein.

31. The Court of Appeal in *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR, when dealing with a similar issue on jurisdiction held that: -

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself”.

32. Having found that this Court lacks jurisdiction to hear and determine the appeal herein, it is clear that the appellants herein filed the instant appeal before a Court without jurisdiction. The appeal is thus a nullity ab initio and it can therefore not be transferred to the *Environment and Land Act* for hearing and determination. I am guided by the Court of Appeal holding in the case of *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR where it was held that: -

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, it is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.”

33. This Court has the option to either dismiss the appeal or strike it out. The former will be disadvantageous to the appellants who will not be heard on merits. The latter will enable the appellants to move the appropriate Court and have their appeal heard on merits. I therefore strike out the appeal with costs to the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 31ST DAY OF MARCH, 2022. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE THEN CHIEF JUSTICE ON THE 17<sup>TH</sup> APRIL, 2020 AND SUBSEQUENT DIRECTIONS, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**



**Ms Nafula for the appellants**

No appearance for the respondent

Mr Oliver Musundi – Court Assistant.

