



Sicily Mutitu & 8 others v Alfred Ndwiga & 2 others (Miscellaneous Civil Application E025 of 2021) [2022] KEHC 12458 (KLR) (29 June 2022) (Ruling)

Neutral citation: [2022] KEHC 12458 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MISCELLANEOUS CIVIL APPLICATION E025 OF 2021
LM NJUGUNA, J
JUNE 29, 2022**

BETWEEN

**SICILY MUTITU NJAGI 1ST APPLICANT
FRANCIS NJERU KARIGI 2ND APPLICANT
LUCY WANDIRI MURIRIA 3RD APPLICANT
ANTHONY MUCHANGI NJUE 4TH APPLICANT
SALESIO NJERU KARIGI 5TH APPLICANT
JACINTA MUTHANJE NYAGA 6TH APPLICANT
TERESIA WANJIRA NYAGA 7TH APPLICANT
NICERA GICUKU KARIGI 8TH APPLICANT
NJAGI KARIGI (DECEASED 9TH APPLICANT**

AND

**ALFRED NDWIGA KITHINJI 1ST RESPONDENT
LEONARD NDWIGA AYUB 2ND RESPONDENT
EPHANTUS NJOKA AYUB 3RD RESPONDENT**

RULING

1. Before this court is the notice of motion brought under section 1A, 1B, 3, 3A and 79G of the *Civil Procedure Act* and dated March 23, 2021 wherein the applicant seeks for orders that:
 - i. Spent.



- ii. The applicant be granted leave to file an appeal out of time against the ruling delivered on January 26, 2021 and the memorandum of appeal attached herewith be deemed as duly filed in time.
 - iii. Costs be in the cause.
2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicants herein. The applicant's case is that they are claiming the Land Parcel no Kyeni/ Mufu/7716 - 7719 which were excised from Land Parcel no Kyeni/ Mufu 2045 that their deceased father (Nyaga Merichi) had given to their brother by the name of Joseph Njeru alias Njeru Kangi to hold in trust for the family. That the said Joseph Njeru alias Njeru Kangi later sold the same land to the respondents herein thus disinheriting them. They urged this court to find in their favour by allowing the application herein.
3. The applicants swore a replying affidavit in which they reiterated that they were never served with hearing notices or judgment notice given that the advocate who was acting for them then, confirmed to them that he was never served with the alleged notices. They deposed that Quickline Auctioneers never served them with any notice but that they were ambushed and in the process of eviction, they lost their property. It was their prayer that the application herein be allowed.
4. The respondents opposed the application by filing a replying affidavit sworn on June 29, 2021 citing among reasons that the applicants are guilty of laches in filing the application herein given that the application of proceedings and judgement was made after 51 days and as such, this application is an afterthought; that the applicants did not plead any probable, sufficient and /or justifiable cause why they did not file an appeal within the stipulated statutory period. It was its case that the applicants' draft memorandum of appeal raises no triable or valid issues in law and as such, has no chance for success. That the applicants despite having raised issues of fraud against the respondents, they failed to prosecute their case thus prompting the lower court to proceed to hear the suit in their absence and further that, they never enjoined the alleged Joseph Njeru Mugo as a party to the proceedings. That the respondents bought land with clean titles free from any encumbrance and as such, they are the legal owners of the contested land. They prayed that the application herein be dismissed with costs to the respondents.
5. Directions were given that the application be canvassed by way of written submissions wherein all parties complied. The applicants submitted that their case at the lower court was dismissed without their knowledge and further that they were never accorded a hearing as should be. That their brother Joseph Njeru who held the land herein in trust for them sold the land to the respondents without their knowledge and that they have been evicted from their rightful ancestral land. It was their case that filing of the appeal herein was affected by the downscaling of court processes due to Covid -19 pandemic that affected the whole country and that the delay is not intentional. It was submitted that they were not even aware that judgement had been delivered and they only realized of the same at the time of eviction. It was their case that the suit in the lower court was not determined on its merits and as such, failure to allow this application will prejudice them given that they stand to be disinherited of their rightful ancestral land. In the end, they urged this court to allow the application herein. Reliance was made on the cases of *Agip Kenya Limited and Highlands Tyres Ltd* (2001) and *MFI Documents Solutions Ltd v Paretto Works Limited*.
6. The respondent on the other hand submitted that the applicants did not file the intended appeal in time and as such, there is no appeal to date filed before this court. That the lower court cases were that of eviction i e Cases nos 83 of 2014, 84 of 2014 and 1 of 2015 which were consolidated into Civil Case no 83 of 2014. It was submitted that the matter proceeded and a judgment entered against the



applicants which was further implemented on March 05, 2021 by Quickline Auctioneers and for that reason, the orders sought have come late in the day and they have been overtaken by events.

7. It was their submission that the applicants were notified of the eminent eviction on February 09, 2021 vide a letter by Quickline Auctioneers dated 08.02.2021. It was further submitted that the applicants annexed a letter dated May 17, 2021 seeking for certified proceedings and judgment after 51 days after the judgment was delivered thus denoting that the application herein is just an afterthought. That the merits and demerits of the applicants' application is pegged on section 79G of the [Civil Procedure Act](#), which requires the applicants to show a 'good and sufficient cause' for the delay. It was further submitted that despite the applicants alleging fraud in the counterclaim, they never enjoined Joseph Njeru Mugo, their brother who had sold his land parcels to the respondents herein free from encumbrances. That there is no certificate of delay which has been annexed to prove that the court was responsible for delaying the documents needed for the intended appeal herein. In the end, it was prayed that the application be dismissed with costs to the respondents.
8. I have considered the application, and the submissions filed herein.
9. Having taken note of the centrality of the orders sought, it is thus important and/or appropriate to discern whether this court is seized of the jurisdiction to entertain an application for extension of time to appeal the judgment delivered on January 26, 2016 by the trial magistrate. From the court records, I note that the judgment was entered after the respondent/plaintiff filed a further amended plaint dated January 23, 2016 and wherein the orders sought by the respondents/ plaintiffs were in the nature of eviction and one directing land registrar to remove caution and or restrictions placed on the suit land.
10. It is important to note that, with the enactment of the [Environment and Land Court Act](#) of 2012, the jurisdiction to determine disputes in relation to ownership, use and disputes relating to land is bestowed on the Environment and Land Court. It is my considered view as such that issues arising out of the instant application are not within the jurisdiction of this honourable court. Despite the issue as to jurisdiction having not been raised by any of the parties, it is trite that the issue (jurisdictional issue) is a fundamental one and the court can determine the same suo moto. [See the decision of the Supreme Court in the case of [Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others](#), Supreme Court Petition no 19 of 2018- paragraph 40).
11. This is why 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 a jurisdiction which it does not possess, its decision amounts to nothing as jurisdiction must be acquired before a case can be heard. [See the case of [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR].
12. Similarly, in the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR, where the Supreme Court held as hereunder;

A court's jurisdiction flows from either the 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 first and second respondents in his submission 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.



[Also see articles 165 (5) and 162 (2) of the constitution; and section 13 of the Environment and Land Court Act].

13. From a reading of the above sections/articles, it is clear that the Constitution}} intended to create special courts with special jurisdiction in land matters. That jurisdiction is not donated to the High Court.
14. As such, the application is hereby struck out for want of jurisdiction.
15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 29TH DAY OF JUNE, 2022.

L NJUGUNA

JUDGE

.....for the appellants

.....for the respondent

