



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NUMBER 187 OF 2018**

**MUKUNA NJOGU.....APPELLANT (Defendant)**

**VERSUS**

**JOHN NJOGU NYOTA.....RESPONDENT (plaintiff)**

**RULING**

The respondent filed **Nakuru CMCC No 655 of 2013** where he sued the appellant seeking the following orders;

- a) An order commanding and directing the defendant and/or his servants, agents, workmen, assigns, relatives and anyone else claiming under him to *vacate from the parcel of land known as Title Number NAKURU MUNICIPALITY BLOCK 9033/11* within seven (7) from the date of the decree herein failing which the plaintiff (with help of auctioneers/bailiffs and with security provided for by the OCS Nakuru or such other police officer) be at liberty to forcefully eject and remove the said defendant from *the land* at the defendant's cost.
- b) An order of permanent injunction restraining the defendant and/or his servants, agents, workmen, assigns, relatives and anyone else claiming under him from *entering, trespassing and in any manner whatsoever dealing with the land Parcel Number NAKURU/MUNICIPALITY BLOCK 9033/11*.
- c) *General damages for trespass* with effect from the date of the consent to occupy were withdrawn to the date the defendant vacates from the land.
- d) Cost of the suit.
- e) Interest on (c), (d) above at court rates. (*Emphasis mine*)

On 8<sup>th</sup> June 2018 the respondent testified and closed his case. A date for defence hearing was fixed. Apparently the appellant was unrepresented up to that point. He appointed counsel before the defence could be heard. His counsel, Ms. Njagua, filed an application to amend the defence, and essentially re-open the case for the plaintiff to allow further cross examination.

This application was opposed by the plaintiff /respondent.

On 9<sup>th</sup> November 2018 the application was found to be without merit and was dismissed.

The defendant was aggrieved filed this appeal on the following grounds:

1. ***THAT the learned trial Magistrate misdirected himself as to the application of Order 18 Rule 10 and Order 8 Rule 3 of the Civil Procedure Rules 2010.***
2. ***THAT the learned trial Magistrate erred in law and fact by failing to re-open the Appellant's case for purposes of further cross-examination to enable the court arrive at comprehensive justice on all the issues arising in the suit.***
3. ***THAT the learned trial Magistrate erred in law and fact in dismissing the Appellant's application dated 28<sup>th</sup> June 2018 without giving regard to the legal essence of amendment to pleadings.***
4. ***THAT the learned trial Magistrate erred in law and fact in failing to give any consideration to the weighty issues raised in the***

*Appellant's supporting affidavit and submission to the application.*

5. *THAT the learned trial Magistrate erred in law and fact in failing to have any regard to the principle of substantive justice when dealing with the application.*

6. *THAT the learned trial Magistrate erred in law and fact by failing to give the Appellant an opportunity to defend his suit to full conclusion.*

7. *THAT the learned trial Magistrate erred in law and seriously misdirected himself when he failed to appreciate that in dismissing the Appellant's application dated 28<sup>th</sup> June 2018 he denied the Appellant the opportunity to fully defend the suit, violating his natural justice right to be heard in the suit.*

8. *THAT the learned trial magistrate in arriving at the decision took into consideration extraneous matters*

Parties agreed to dispose of the appeal by way of written submissions. In his submissions the respondent raised the issue that this court lacks jurisdiction to determine this appeal. It is the submission of the Respondent that this is a matter involves land and falls squarely in the exclusive jurisdiction of the Environment and Land Court.

I noted that the appellant did not respond to the issue.

I have no choice but to first determine this issue of jurisdiction before I can delve into the merits of the appeal.

Jurisdiction was defined in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR**

***".....By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of 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.***

The court went on to say when this issue ought to be raised:

***.....It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court...I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.***

Further what a court ought to do upon determination of the issue

***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.***

Are there any limits to the jurisdiction in matters concerning land?

Citing the case of **National Land Commission vs Afrison Export import Limited & 10 Others [2019] eKLR** the respondent pointed out that the limits of this Court's jurisdiction in land matters is limited by non-other than the Constitution, and statute. He relied on the following passage:

***"The first issue relates to the jurisdiction of this Court. The broad jurisdiction of the Environment and Land Court is donated by Article 162 of the Constitution which establishes the three tiers of Kenya's Superior Courts. It provides thus:***

1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred in clause (2)*

2) *Parliament shall establish court with the status of the High Court to hear and determine disputes relating to-*

a) *employment and labour relations; and*

b) *The environment and the use and occupation of, and title to, land*

3) *Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2)*

4) *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article*

*In the discharge of the mandatory obligation placed on it by the Constitution, Parliament enacted the Environment and Land Court Act and set out in details, the jurisdiction of the Court. Section 13 of the Act outlines the jurisdiction of the court as follows:*

### 13. Jurisdiction of the Court

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 interest in land and*

e) *any other dispute relating to environment and land.*

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 and fundamental freedom relating to a clean and health environment under Articles 42, 69 and 70 of the Constitution.*

4) *In addition to the matters referred to in subsection (1) and (2), the Court shall exercise appellant jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court....*

It is to be noted that under Article 165(5), the Constitution expressly bars the High Court against exercising jurisdiction in respect of matters reserved for the Supreme Court of falling within the jurisdiction of the third tier superior courts established under Article 162(2) of the Constitution. Article 165(5) of the Constitution provides thus:

“The High Court shall not have jurisdiction in respect of matters

a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution or

b) falling within the jurisdiction of the courts contemplated in Article 162(2): (Emphasis mine)

The question is, does this court have jurisdiction to hear the appeal herein?

It is evident that the dispute before the learned trial magistrate is a dispute about land. The ELC court is the one empowered to have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) b of the Constitution and any other disputes relating to environment and land.

It is clear that this court does not have jurisdiction to hear and determine this appeal.

In the interests of justice, I will not strike the appeal out but rather direct that the file be transferred the Environment and Land Court for hearing and determination.

Parties to appear before the Deputy Registrar ELC within two weeks hereof to confirm that the file has been transferred.

**Dated this 31<sup>st</sup> day of March 2021**

(The ruling ought to have been sent via email but was inadvertently left out. The delay is regretted)

Signed and Delivered via email this 24<sup>th</sup> day of June 2021

**Mumbua T Matheka J**

CA: Edna

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