



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**CIVIL APPEAL NO. 1 OF 2016**

**HIRAM MUIGAI.....APPELLANT**

**-VERSUS-**

**ANNA WANJIKU WAINAINA.....RESPONDENT/OBJECTOR**

*(Being an appeal from the judgement of Hon. M. O Okuche dated 24/12/2015 arising out of CMCC 27 of 2010 on an award of general damages and costs of the suit).*

**RULING**

The appellant who was the defendant in the original suit being dissatisfied with the judgement of the Learned Magistrate Court touching on the tort of nuisance and right to a clear environment has filed an appeal to this court. The Respondent/Plaintiff has raised a jurisdictional issue as a preliminary point before the appeal is heard on grounds that the High court has no jurisdiction to entertain the appeal.

I have considered both submissions by Mr. Mwangi Chege for the appellant and Mr. Githuka Ndungu for the respondent. From the foregoing I am of the considered view.

The law on the effect of lack of jurisdiction. The following statement taken from the classic case of the **“Owners of the Motor vessel Lillian ‘S’ v Caltex Oil (Kenya) Ltd 1989 KLR** represents the doctrine as it is generally applied in Kenyan courts. The court presided by Nyarangi J. A state as follows:

*“I thank 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. 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.”*

One of the latest decisions recognizing the doctrine of jurisdiction and its application is formed in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others 2012 eKLR**. After examining the action brought before it by the appellant and the statutes which prescribed the procedure to be followed, the Supreme Court held inter alia that:

*“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 itself jurisdiction exceeding that which is conferred upon it by law. The issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere technicality: It goes to the very heart of the matter for without jurisdiction the court cannot entertain any proceedings.....”*

This distinction runs throughout the cases on the various subject matter of law in the many forums in our courts for adjunction. The importance of these decisions: **Motor Vessel Lillian and /Samuel Kamau Macharia v KCB (Supra)** lies the language used in reference to the effect of any order, or judgement issued by a court without jurisdiction.

The appellant’s case involved the subject matter related to discharge of effluent not fit to be discharged to the environment into the respondent’s parcel of land. The Learned Trial Magistrate in his judgement established that the appellant’s septic tank/soak pit leaked and the raw sewage formed its way to the respondent’s plot that shared a perimeter wall. Further there was a finding on environmental hazard and as a consequence awarded general damages, costs and interest of the suit. Although at this stage I am not sitting on appeal of the case is on the rule in **Rylands v Fletcher 1861-73 (ALL E.R)** on strict liability applies to the facts of this claim.

In a nutshell, the rule is that a thing must have been accommodated in the tortfeasor’s land for their own use; the thing must have escaped and caused mischief regardless of the tortfeasor’s negligence and the thing was for a non-natural use of the land.

Briefly, stated this principle formed the basis upon which the Learned Trial Magistrate decided the claim. The decisions cited above are by no means the last words on the subject matter jurisdiction interests. There are matters in which the courts share concurrent jurisdiction where there are cross-cutting issues.

As stated by **Angote J in Tazmac Ltd & 2 Others 2013 eKLR:**

***“in such scenarios courts should tread cautiously so as not to dismember any party to the dispute by having each distinct hereto to be heard and determined separately by the separate courts. That according to the Judge would a result to an absurdity and miscarriage of justice which was not what was intended by the constitution.”***

However, even the midst of this persuasive authority I hold a strong view the court has no power to extend its jurisdiction on grounds that there is some issue in the dispute which scarcely confers jurisdiction. The scope of the authority given by the constitution and statute law should be sanctly protected.

Jurisdiction of this matter on appeal can be derived from the pleadings and judgement of the trial court. The courts determination of it on appeal to me squarely falls within the provisions of Article 162(2) (5) of the constitution and Sections 13(1) (2) of the Environment & Land Court Act.

The effect of judgements founded upon Land and Environmental violations represents prima facie evidence that jurisdiction is vested in the Land and Environment Court. The language in the pleadings as used by the court in its judgment behoves on me that there is lack of jurisdiction apparent on the face of the record.

Weighing against all these this court being a creature of the constitution the statement of the Supreme Court in Macharia Case and the court of Appeal in Owners of Motor Vessel (Supra) are equally applicable to the facts of this case and as such I do down tools due to want of jurisdiction. On this note of course I uphold the preliminary objection on lack of jurisdiction over the subject matter in the original action with costs.

**Dated, delivered and signed in open court at Kajiado this 28<sup>th</sup> day of March, 2019.**

.....

**R. NYAKUNDI**

**JUDGE**

**Representation**

Mr. Githuka for the Respondent

Mr. Mwangi Chege for the Appellant