



**Shikoto v Opaki & 3 others (Environment and Land Appeal E042 of 2022)
[2023] KEELC 20953 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20953 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E042 OF 2022
DO OHUNGO, J
OCTOBER 25, 2023**

BETWEEN

WYCLIFFE LUVEMBE SHIKOTO APPELLANT

AND

ELIZABETH AJITSA OPAKI 1ST RESPONDENT

JIMMY CHIBOLE 2ND RESPONDENT

MARTIN CHIBOLE 3RD RESPONDENT

STEPHEN BAHATI MUSINDAI 4TH RESPONDENT

*(Being an appeal from the ruling and order of the Chief Magistrate's
Court at Kakamega (Hon. Hazel Wandere, Senior Principal Magistrate)
delivered on 23rd August 2022 in Kakamega MCELC No. E117 of 2021)*

JUDGMENT

1. Litigation leading to this appeal commenced in the Subordinate Court when the appellant filed plaintiff dated 19th July 2021. He joined the first to fourth respondents as the first to fourth defendants respectively. He sought cancellation of title to the parcel of land known as Isukha/Shirere/5527 (the suit property), whose registered proprietor was the fourth respondent, on allegations of fraud and breach of agreement.
2. The respondents reacted to the plaintiff by filing a joint statement of defence on 25th August 2021. Simultaneously, they also filed Notice of Motion dated 20th August 2021, in which they prayed for the following orders:
 1. That this honourable court has no jurisdiction to try this suit.



2. That the plaintiff's suit herein be and is hereby dismissed with costs to the defendants for want of jurisdiction.
 3. That that any caution, restriction, caveat and or inhibition placed and or registered on land parcel number Isukha/Shirere/5527 be lifted.
 4. That the costs of this application and suit be paid by the plaintiff.
3. Upon hearing the application, the Subordinate Court (Hon. Hazel Wandere, Senior Principal Magistrate) delivered a ruling on 23rd August 2022 and allowed the application as prayed.
 4. Dissatisfied with the outcome, the appellant filed this appeal through Memorandum of Appeal dated 16th September 2022 wherein he prayed that the appeal be allowed, the ruling of the Subordinate Court be reversed, and Notice of Motion dated 20th August 2021 be dismissed.
 5. The grounds of appeal as listed on the face of the Memorandum of Appeal are as follows:
 1. That the trial court erred in dismissing the appellant's suit on an interlocutory application when the same was not warranted.
 2. That the trial court erred in failing to consider at all and/or follow the principles for striking out/dismissing a suit at an interlocutory stage thereby exercising her discretion wrongly and arriving at a grossly erroneous decision.
 3. That the trial court erred by failing to appreciate that the respondents' application to have the appellant's suit dismissed at an interlocutory stage was indeed a preliminary objection in disguise and the same ought not to have been entertained because of the need to ascertain by trial the fact of the disputed value of the suit property and moreso (sic) when what the respondents sought was the exercise of judicial discretion.
 4. That the learned trial magistrate was wrong in placing reliance on a valuation report whose authenticity and/or veracity or probative value or otherwise could only be established upon a full trial.
 5. That the learned trial magistrate wrongly assumed that the allegations made by the respondents about the suit property were correct thereby falling in error by allowing the application dismissing the appellant's case.
 6. That the learned trial magistrate erred in law and fact by failing to appreciate that the plaint before her disputed a fraudulent land transaction over which her court had full jurisdiction.
 7. That the decision of the learned trial magistrate has driven the appellant from the seat of justice and blocked the appellant from being heard on his case thereby violating the appellant's fundamental right to a fair hearing.
 8. That the decision of the learned trial magistrate is clearly a travesty of justice and a scheme to aid and shield a fraud and should not be left to stand.
 9. That the decision of the learned trial magistrate is casual, rash, perfunctory and was arrived at without due circumspection and has occasioned a serious miscarriage of justice.



6. The appeal was canvassed through written submissions. The appellant argued that the application was essentially a preliminary objection in disguise and that the Subordinate Court ended up striking out the suit, an exercise that required great caution before terminating a suit in such a summary manner. Reliance was placed on the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR.
7. The appellant went on to argue that the Subordinate Court casually terminated the appellant's case without making any attempt to evaluate the appellant's claim as contained in the plaint and the accompanying statement. That since the suit did not go to trial, the Subordinate Court was wrong in dogmatically believing the respondents plea that the suit property was at KShs 32,000,000 and therefore beyond her pecuniary jurisdiction when the valuation report relied on by the respondents was a mere annexure to an affidavit which was not tested through cross examination of the author. He contended that it was wrong for the court to assume that the contents of the valuation report were correct. That in the circumstances, he was prevented from having his case heard, in contravention of his right to be heard and the right to a fair hearing. He relied on the cases of *Gladys Jepkosgei Boss v Star Publication Limited* [2021] eKLR and *Britam General Insurance Limited v Ukwale Agnes Ndungu* [2019] eKLR and urged this court to allow his appeal.
8. On their part, the respondents argued that the Subordinate Court did not have the requisite pecuniary jurisdiction since the value of the subject matter which was the suit property was beyond KShs 20 million. They further contended that the main issue in dispute before the Subordinate Court had to do with the title to the suit property since the appellant sought cancellation of title. Relying on the cases of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 and *Leo Investment Limited v Mau West Limited & another* [2019] eKLR, they argued that the Subordinate Court properly laid down its tools once it emerged that it lacked jurisdiction and that the appellant failed to avail his own valuation to counter that of the respondents. They further cited *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR as well as *Embu County Government v University of Embu* [2020] eKLR and argued that the suit was null and void ab initio for being filed in a court without jurisdiction and could not be transferred to another court. They therefore urged the court to dismiss the appeal with costs.
9. The principles applicable while considering an appeal such as the present one are that that an appellate court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong due to misdirection or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration with the result that it arrived at a wrong conclusion. See *Mombasa Cement Limited v Kitsao & 34 others (Civil Appeal E016 of 2020)* [2022] KECA 562 (KLR) (24 June 2022) (Judgment).
10. I have carefully considered the pleadings, the grounds of appeal and the parties' submissions. The issues that arise for determination are whether the Subordinate Court had jurisdiction and whether the reliefs sought were available.
11. The suit was filed in the Chief Magistrate's Court at Kakamega. Pursuant to Section 7 (1) (a) of the *Magistrates' Courts Act*, 2015, the said court has jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed twenty million shillings. As noted earlier, the suit concerned the question of whether the fourth respondent's title to the suit property should be cancelled pursuant to the appellant's allegations of fraud and breach of agreement. Thus, the subject matter of the suit was clearly the suit property as well as its ownership.
12. Jurisdiction, as has been stated severally, is everything. A court of law cannot take any valid step in the absence of jurisdiction. The court's jurisdiction flows from either *the Constitution* or legislation



- or both and it can only exercise jurisdiction as conferred on it by law. See Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR. Any order or step taken by a court in the absence of jurisdiction is a nullity. See Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR.
13. Lofty as the foregoing statements may be, determination of whether jurisdiction exists is oftentimes a mixed question of fact and law, with the result that the divide between jurisdiction and absence of it can become fluid, especially if its determination depends on disputed facts. In the context of pecuniary jurisdiction of Magistrate’s Courts, the law is straight forward enough. The only moving target would be the determination of the value of the subject matter.
 14. The question that emerges in the present appeal is whether the learned magistrate was faced with a situation of disputed facts on the question of the value of the suit property. A perusal of the record shows that Notice of Motion dated 20th August 2021 was supported by an affidavit sworn by the fourth respondent. He deposed that the suit property had a value of KShs 32 million and supported that contention with an annexed inspection and valuation report dated 20th August 2021. The report put the combined value of the land and developments thereon at KShs 32 million.
 15. The appellant responded to the application through his replying affidavit sworn on 27th September 2021. He contended that the value in the valuation report was exaggerated but neither gave his own figure as to valuation nor annexed any valuation report to controvert the respondents’ valuation. In those circumstances, the learned magistrate cannot be faulted for basing her decision on the only evidence that was available to her. Having taken the liberty to file the kind of response that he did, the appellant cannot be heard to say that he was prevented from having his case heard or that his right to a fair hearing was contravened.
 16. While the appellant has argued that the dispute involved KShs 550,000 based on an agreement between him and the first to third respondents, one only needs to look at the prayers in the plaint to appreciate that the appellant went for the fourth respondent’s title as opposed to any claim for a sum of KShs 550,000.
 17. I have perused the valuation report that was relied upon by the respondents. It is quite detailed and describes the suit property well, complete with photographs. Among others, it states that as of 19th August 2021 when the valuers inspected the suit property, it was developed with two blocks of apartments each of which had eight apartments. Thus, there were a total of sixteen apartments. Each apartment had two bedrooms and a sitting room. I see no valid reason to fault the conclusion that the value of the suit property was beyond the sum of KShs 20 million, and thereby beyond the pecuniary jurisdiction of the Subordinate Court.
 18. As the Court of Appeal stated in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR, a suit filed in a court without jurisdiction is dead on arrival and cannot be remedied. I agree with the learned magistrate that the Subordinate Court did not have jurisdiction to hear and determine the matter.
 19. There is however one aspect in which I agree with the appellant. Having found that she did not have jurisdiction, the learned magistrate ought to have struck out the suit as opposed to dismissing it. Equally, the order that any caution, restriction, caveat and or inhibition registered against the suit property be removed had no correlation with the issue of jurisdiction which was the sole question before her. Indeed, having found that the court had no jurisdiction, the court could not validly go ahead and make other orders in the matter such as removal of cautions as was sought at prayer 3 of the



application. It simply had to strike out the suit and down its tools. I also note that the respondents did not offer any evidence in their supporting affidavit to justify the prayer for removal of cautions.

20. In view of the foregoing discourse, this appeal partly succeeds. Consequently, the ruling and order of the Subordinate Court is replaced with the following orders:
- a. The appellant's suit in the Subordinate Court is struck out for want of pecuniary jurisdiction.
 - b. Prayer 3 of Notice of Motion dated 20th August 2021 is not granted.
 - c. The respondents shall have costs Notice of Motion dated 20th August 2021 and of the suit in the Subordinate Court.
 - d. Considering that both sides in this appeal have had some measure of success, I order that each party shall bear own costs of this appeal.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Nyikuli for the Appellant

Mr Abok for the Respondents

Court Assistant: E. Juma

