



**Oluoch v Omulo & another (Environment & Land Case E043 of 2022)
[2023] KEELC 21832 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21832 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E043 OF 2022
SM KIBUNJA, J
NOVEMBER 29, 2023**

BETWEEN

SAMUEL OUMA OLUOCH APPELLANT

AND

QUITER AYO O OMULO 1ST RESPONDENT

KENYA INDUSTRIAL ESTATES LIMITED 2ND RESPONDENT

(Being an appeal from the judgement delivered on the 15th September 2022 by the Hon. Maureen Nabibya, Senior Principal Magistrate in Mombasa MCELC No. 759 of 2019)

JUDGMENT

1. The appellant has raised the following nine (9) grounds through his memorandum of appeal dated the 14th October 2022:
 - a. That the learned magistrate erred in law and fact and misapprehended herself by failing to appreciate that the 1st respondent had entered appearance vide a memorandum of appearance and also filed statement of defence dated the 4th March 2020 in the trial suit and failed to consider the admission at paragraphs 3 and 5 thereof.
 - b. That the learned magistrate erred in law and fact and misapprehended herself by failing to appreciate that the 1st respondent had instructed Ms. M. Ananda & Company Advocates who participated in the proceedings before being granted leave to cease acting prior to the hearing slated for the 1st respondent's case.
 - c. That the learned magistrate erred in law and fact when she placed an over reliance on procedural technicalities contrary to section 159(2)(d) of *the Constitution* of Kenya, and failure to appreciate the need for 1st defendant to testify in court for the court to ascertain the veracity of the admission in the statement of defence.



- d. That the learned magistrate erred in law and fact and misapprehended herself by failing to appreciate that the matrimonial property that was valued and report thereof used as security for purposes of obtaining a loan facility by 1st respondent from 2nd respondent belonged- to the 1st respondent.
- e. That the learned magistrate erred in law and fact and failed to appreciate that the appellant was never served with any statutory notices and demand letters by the 2nd respondent in contravention with section 90 of the Land Act No. 6 of 2012, thereby rendering any sale, transfer, alienation of the suit property pursuant to the charge null and void.
- f. That the learned magistrate erred in law and fact in failing to make a finding on whether the 2nd respondent had complied with all the mandatory legal requirements including serving the appellant with all notices as expressly demanded under the law.
- g. That the learned magistrate erred in law and fact by failing to exercise her discretion in a judicial manner and in accordance with the law.
- h. That the learned magistrate erred in law and fact by failing to appreciate the documentary evidence filed by the appellant.
- i. That the learned magistrate erred in law and fact by failing to appreciate the weighty issues and documentary evidence raised by the appellant in her pleadings thereby reaching the wrong decision.

The appellant therefore seeks for the following orders:

- i. This appeal be allowed.
 - ii. The decision of the learned magistrate be quashed.
 - iii. The judgement delivered thereto be set aside.
 - iv. Costs of this appeal be provided for by the respondents.
 - v. Such further or other order as this court may deem fit.
2. The court gave directions on filing and serving of the Record of Appeal on the 7th November 2022 and 23rd January 2023. Then on the 9th May 2023, the court admitted the appeal and directed that it be canvassed through submissions to be filed and exchanged within the timelines given. When the matter came up in court on the 23rd October 2023, the learned counsel for the appellant confirmed that they had filed theirs dated the 19th July 2023 that the court has considered. The counsel for the 2nd respondent indicated that they had not filed theirs due to some oversight on their part. The court directed that they file and serve theirs before close of business that day. Though there is no physical copy of their submissions on the file, I have seen a copy filed through the e-filing portal that I have equally considered.
 3. The 1st defendant did not participate in the appeal at all.
 4. The following are the issues for the determinations by the court in this appeal:
 - a. Though not specifically addressed by the parties herein, the court's jurisdiction in this appeal is of paramount importance.
 - b. Whether the appellant has established any errors of facts and law that amounted to a misdirection on the part of the learned trial magistrate.



- c. Whether the appeal has merits.
 - d. Who pays the costs in this appeal?
5. The court has carefully considered the grounds on the memorandum of appeal, the submissions by the learned counsel, superior courts decisions cited thereon, the Record of Appeal and come to the following determinations:

- a. As this is a first appeal, the court is required to reconsider the evidence tendered before the trial court, evaluate it itself and come to its own conclusions, as was well restated in the case of Barnabas Biwott versus Thomas Kipkorir Bundotich [2018] eKLR, in which the case of Selle & Another versus Associated Motor Boat Co. Ltd [1968] EA 123 was cited where it held that;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

- b. The appellant had commenced the suit in the lower court through the plaint dated the 22nd May 2019 that is at page 9 of the Record of Appeal. The 1st and 2nd respondents replied to the claim through their statements of defence dated the 4th March 2020 and 26th February 2021 that are at pages 80 and 85 of the Record of Appeal respectively. The averments in the plaint and the two statements of defence clearly shows the following among others:
 - i. The claim before the lower court was over the loan transaction of 2016 between the two respondents and the charge over land parcel MN/Block 2/596 Miritini Mombasa, executed on the 28th June 2016.
 - ii. That the said land was registered in the names of the appellant and 1st respondent.
 - iii. Though the appellant at paragraph 5 of the plaint claimed the 1st respondent took the loan using the title to the said land from the 2nd respondent without his knowledge, the 1st respondent at paragraph 4 of her defence has disputed that allegation.
 - iv. The 2nd respondent has in their defence inter alia averred that both the appellant and 1st respondent were actively involved in the loan transaction and the execution of the charge over MN/Block 2/596 as part of the securities. That the appellant and two others executed the deed of guarantee for the repayment of the loan. That the 1st respondent defaulted in the loan repayments and all the requisite notices were issued and served. That the notices were copied to the appellant through the address he had provided in the charge document and deed of guarantee. That the advertised sale was regular and lawful, but has not been pursued because of the court order they were served with.

The above facts that are discerned from the parties’ pleadings leads this court to conclude that the issues that were before the lower court were in the nature of disputes relating to commercial transactions.

- c. Jurisdiction is not conferred by the parties but by *the Constitution* and the statutes. The mere fact that the parties in a dispute before the court, like in the instant appeal, have not objected



to the court's jurisdiction does not preclude the court from determining whether it is with jurisdiction in the issues for determination. In the case of Owners of Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Limited (1989) eKLR, the court held that:

"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 Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

- d. The Court of Appeal in the case of Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 Others [2017] eKLR, held as follows on a related matter:

"Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to 'use' of land as discussed herein above. Such contracts, in our view, ought to be incidental to the 'use' of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court."

And in the case of Diamond Trust Bank Kenya Limited versus Fatma Hassan Hadi Malindi Court of Appeal Civil Appeal No. 18 of 2020, the court cited the Supreme Court of Kenya case of Samuel Kamau Macharia & Another versus Kenya Commercial Bank Limited & 2 Others [2012] eKLR, where it was held 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 to itself jurisdiction exceeding that which is conferred upon it by law."

The court went on to refer to two other Supreme Court of Kenya decisions in the cases of Matter of Interim Independent Electoral Commissions, Constitutional Application No. 2 of 2011 [2011] eKLR, and Republic versus Karisa Chengo & 2 Others [2017] eKLR, on the issue of jurisdiction and then held as follows:

"30. The holding by the learned judge in the present case that "a charge is an instrument granting an enforceable interest in land meaning therefore that this court has jurisdiction to hear disputes relating to charges" therefore flies in the face of the decision of this court in Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 Others (above). Recently, this court in P. J. Dave Flowers Limited versus Limuru Hills Limited Malindi Civil Appeal No. 123 of 2019 in affirming that the ELC had, in the circumstances of that case, jurisdiction to entertain the dispute noted that the appellant therein "clearly had an interest in the interest in the suit premises as a purchaser" and had therefore acquired interest that conferred jurisdiction on the ELC to hear and determine the matter.



31. in the present case, although the respondent is not privy to the instrument of legal charge, there is no doubt that what the respondent is seeking before the ELC, is to restrain the Bank from exercising its statutory power of sale. That in our view, following the decision of this court in Co-operative Bank of Kenya Limited versus Patrick Kangethe Njuguna & 5 Others (above), is a commercial matter for adjudication before the High Court.....
 33. in conclusion- therefore, we are satisfied that the proper forum for adjudication of the respondent's suit is the High Court and not the ELC and the learned judge erred in asserting jurisdiction. Being of that view, we need not address the question whether the judge judiciously exercised his jurisdiction in granting the interlocutory injunction.
 34. the appeal succeeds.... The ruling of the ELC is hereby set aside and substituted with an order striking out the respondent's application for injunction dated the 13th June 2019. It follows that the respondent's suit having been instituted in a court without jurisdiction, the same is hereby struck out with costs to the respondent.”
- e. The appellant in this appeal no doubts seeks for the decision of the learned trial magistrate delivered on the 15th September 2022 quashed and set aside. The net effect of such an order would be to grant the appellant's prayers in the plaint dated the 22nd May 2019 which includes declaration that the charge over the suit property between the 1st and 2nd respondents and any alienation thereof is null and void ab initio; permanent injunction, partitioning of the suit land to have one half registered in his name. The predominant issue in the appellant's claim is the legality of the legal charge instrument and all the other matters are incidental thereto. The appellant's suit before the lower court was undoubtedly a civil claim of a commercial nature and not a land claim suit. Flowing from the Court of Appeal and Supreme Court of Kenya decisions referred to above, especially Diamond Trust Bank Kenya Limited versus Fatma Hassan Hadi [supra], which are binding to this court, the correct forum to lodge an appeal against the lower court decision over the disputes surrounding the charge document is the High Court and not the Environment and Land Court.
 - f. That having come to the determination that this court is without jurisdiction in the appeal, then the court does not need to pronounce itself on the other issues that touches on the merit or otherwise of the petition.
 - g. That I would however grant the costs of this appeal to the 2nd respondent in accordance with section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya that provides that costs shall follow the events unless otherwise directed by the court on good cause.
6. In the upshot of the foregoing, the court finds and orders as follows:
 - a. That the appeal herein is struck out for the court is without jurisdiction.
 - b. The appellant to pay the 2nd respondent's costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF NOVEMBER 2023.

S. M. KIBUNJA, J.



In the presence of:

Appellant: Mr. Kazungu.

Respondents: Mr. Osumba for Juma.

Wilson –Court Assistant.

