



REPUBLIC OF KENYA



**Kamencu v Ikiao & another (Environment and Land Appeal  
43 of 2020) [2022] KEELC 2233 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2233 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL 43 OF 2020**

**CK NZILI, J**

**MAY 18, 2022**

**BETWEEN**

**ZAKAYO KAMENCU ..... APPELLANT**

**AND**

**JENNIFER KANARIO IKIAO ..... 1<sup>ST</sup> RESPONDENT**

**DOUGLAS KINYUA IKAMATI ..... 2<sup>ND</sup> RESPONDENT**

*(An Appeal from the Ruling of the Honourable G. Sogomo – Principal  
Magistrate on 30th April 2020 in ELC case no. 17 of 2020 at Tigania)*

**JUDGMENT**

**A. Background**

1. The appellant in the lower court had been sued by the respondent herein as the owner of Plot No. 92 Kianjai market for trespassing into Plot No's 133 and 134 and putting up constructions there on. They prayed for declaratory orders that they were legal owners of the two parcels, a permanent injunction and general damages for wrongful encroachment.
2. The appellant filed a defence and counterclaim dated 22.5.2020 admitting ownership of Plot No. 92 Kianjai market and averred that the suit raised no cause of action against him.
3. In his counter claim the appellant averred the respondents had fraudulently misrepresented the facts by positioning or placing his land right on their land without ascertaining clear boundaries and or availing authentic documents thereof. He sought for a declaration that Plot No. 92 belonged to him on account of Minister's authority and documents thereof.
4. Through an application dated 28.4.2020 the respondent sought for temporary orders of injunction barring and restraining the appellant from entering, remaining upon, constructing or continuing to construct upon suit land Kianjai market. The application was supported by a supporting affidavit of



Jeniffer Kanario Ikiao sworn on the even date in which she attached the approved application for the plot from the defunct county council of Nyambene, minutes and receipts, permission and approvals to develop the plots, bundle of receipts for rates and rents payments and protest letter to the physical planning office Meru regarding the illegal developments marked as JK 1 (a) – (e) JK 2 (a) – (j), JK 1 3(a) – (d) and JK 14 (a) – (b) respectively.

5. The application was also supported by an affidavit sworn on 28.4.2020 by Douglas Kinyua Ikamati, the 2<sup>nd</sup> respondent attaching minutes; receipts for payment of rates and rents and protest note to the physical planning office marked as DK 11 DK 2, DK 3 and DK 4 respectively.
6. The trial court proceeded to issue its ruling on 3.4.2020 allowing the application triggering this appeal.
7. By an application dated 22.5.2020 the appellant sought for the stay, discharge, variation or setting aside the interim orders of injunction granted on 30.4.2020. The grounds of the application were that the injunctive orders were causing great hardship, inconvenience and financial loss to the applicant; the suit disclosed no cause of action against him; the order was final and implied an eviction; the claimants could be compensated by way of damages and that it was in the interest of justice to lift or vary the interim orders.
8. In the sworn affidavit, the applicant attached photographs showing his extensive developments on the land for over 27 years; he averred the respondents were never in possession of the suit land, since he had duly approved and paid up building plans requisite approvals, licences and compliance certificates from National Environmental Management Authority (NEMA) and National Construction Authority, he was an innocent party/purchaser suffering out of adverse orders; there was delay in filing a suit and stopping his developments which had been on since 1993 and that the applicants could be compensated by way of damages.
9. The appellant also filed a notice of preliminary objection dated 12.8.2020 on the basis that the suit offended Section 7 (1) (c) of the *Magistrates Court Act 2015*, the court lacked pecuniary jurisdiction to entertain the suit, the suit was brought in bad faith, was frivolous, vexatious and an abuse of the court process.
10. The 1<sup>st</sup> respondent opposed the appellant's application through a replying affidavit sworn on 1.12.2020 for lack of merits, as overtaken by events, brought after an inordinate delay and for distorting facts the ownership of the suit parcels.
11. By a ruling dated 23.9.2020 the court dismissed the preliminary objection dated 12.8.2020 precipitating this appeal following leave granted on 27.9.2021.

## **B. The Appeal**

12. The appellant has moved to this court complaining against the two rulings on the basis that:- the trial court issued indefinite orders which were exparte; it was beyond the pecuniary jurisdiction of the court; orders were issued when the two parties were in cross purposes; the rulings were based on the misleading evidence; the court failed to consider the appellant's evidence and hear his application dated 22.5.2020; found the appellant in contempt and dismissed the preliminary objection, the court was wrong to expunge the valuation report, and failed to deal with the issue of jurisdiction at the preliminary stage.

## **C. Preliminaries**

13. On 3.5.2021 this appeal was admitted for hearing, an order was made for the record of appeal to be filed within 60 days and a pretrial conference date given for 27.9.2021.



14. Subsequently, on 27.9.2021, the appellant was granted 7 more days to file an amended memorandum of appeal and a record of appeal failure of which the appeal was to stand dismissed.
15. Further on 26.10.2021 leave was granted to amend the record of appeal within 21 days. Parties were also directed to file written submissions within 21 days. On 16.12.2021, the appellant sought and was granted 30 more days to file and serve the amended record of appeal failure of which the appeal was to stand dismissed. Once more, parties were directed to file written submissions.
16. The matter came up for mention on 16.2.2022 in which Mr. Mokuia Obiria informed that the court the appellant had not adhered to the time lines, hence the respondent unable to file written submissions. The court record indicate a record of appeal was filed on 17.1.2022.
17. This in my considered view was within 30 days as ordered by the court since time does not run between 21<sup>st</sup> December in any year and the sixth day of January in the year following both days included for the delivery or filing of any pleading or doing any other Act under the Civil Procedure Rules.

#### **D. The Mandate of the Appellate Court**

18. This being a first appeal the appellate court has the mandate to re-hear, rehearse or re-evaluate the lower court record and come up with its independent findings and conclusion See *Peter v Sunday Post Ltd* 1958 EA 424.
19. In this appeal, the court has set out the pleadings before the trial court. The first ground of appeal of the appellant relate to the application for injunction delivered on 30.4.2020 and which is said to have been heard exparte, that the court gave out indefinite orders, yet it lacked the pecuniary jurisdiction, parties were at cross-purposes and was based on misleading evidence by the respondents.
20. The court record shows the respondents came to court under a certificate of urgency dated 28.4.2020 supported by an affidavit sworn on 28.4.2020 by Douglas Kinyua in which they attached ownership documents to the suit land. The trial court proceeded to issue interim orders on 30.4.2020 and gave an inter partes hearing for 1<sup>st</sup> Thursday, week after the lifting of Covid 19 pandemic threat restrictions.
21. The appellant was served with the orders, the application and summons to enter appearance. He therefore entered appearance on 19.5.2020.
22. By an application dated 20.5.2020 the respondents sought for contempt of court proceedings against the appellant. The court on 22.5.2020 directed the said application to be served for a mention on 11.6.2020. The appellant eventually filed his defence and counter claim on 26.5.2020.
23. In the said defence and counter claim, the appellant's only preliminary objection was that the suit disclosed no cause of action against him. There was no pleading that the court had no pecuniary jurisdiction to hear and determine the matter.
24. Similarly, the appellant did not plead that the value of his developments on the suit land were beyond the pecuniary jurisdiction of the court, or put in the list of documents in support of his defence and counter claim anything showing that the suit parcels of land were not adjoining each other. Instead, the appellant filed a replying affidavit and written submissions dated 16.6.2020.
25. Subsequently, it took the appellant up to 16.8.2020 to file the notice of preliminary objection dated 12.8.2020 and raise the issue of section 7 (1) (c) of the Magistrates Court Act.



## E. Written Submissions

26. In the written submissions dated 16.9.2020 the appellant took the view that the jurisdiction of the principal magistrate was capped at Kshs.10 million in his view the suit property described both in the plaint and the counter-claim was alleged to be valued at Kshs.14,000,000. The appellant attached a valuation report to the written submissions and urged the court to down its tools.
27. Further, the appellant submitted the property was at the centre of Kianjai market attracting at least Kshs.20 million in value hence the court should reconsider its power to handle the suit. Reliance was placed on *Phoenix of EA Assurance Co Ltd v S M Thiga t/A Newspaper Services* [2019]eKLR
28. On the part of the respondents by written submissions dated 17.9.2020 it was stated the alleged preliminary objection was a misnomer based on facts yet to be ascertained and on matters requiring discretion. Further, the respondents submitted the preliminary objection was based on a valuation report whose maker had not be authorized by the court, was misplaced and not properly introduced in the proceedings.
29. As regards the application dated 20.5.2020 the appellant filed a replying affidavit sworn on 23.10.2020, for contempt of court in which he attached receipts and invoices for the daily loss as annexures ZK 1 (a) and (b), documentation for the extensive development as annexure ZK – 2, request for security based on a valuation report for the property at Kshs.14 million as per attached valuation report marked as ZK – “3”, maps for the area marked as ZK – “4” and copies of approvals marked as ZK “5”.
30. From the court’s records, it appears the application dated 22.5.2020 seeking for the setting aside the exparte orders of injunction was never heard and determined yet it was filed under certificate of urgency and before the preliminary objection was filed and soon after the order for injunction was issued.
31. The respondent by a handwritten letter dated 25.8.2020 sought for an early hearing date for the preliminary objection alleging that the appellant was procrastinating the matter leading to taking of a date for 9.9.2020.
32. Even before then there is no indication that the appellant set down for hearing his or asked his application be heard alongside the notice of motion dated 20.5.2020 when directions were given before court on 11.6.2020, 8.7.2020, 25.8.2020, 9.9.2020, 18.9.2020 and 23.9.2020 yet the appellants counsel was ever present during those said days.
33. If the appellants counsel was vigilant he would also have brought to the attention of the court that the valuation report had also been annexed to the appelants replying affidavit opposing the application for contempt of court.
34. Further on 14.10.2020, the appellant appeared in person in relation to the contempt application, did not raise the issue that the orders he was alleged to have contravened, were subject to his pending application for setting aside, review and variation which was yet to be determined.
35. It was only much later on 19.11.2020 that the appellant’s counsel sought for the application to be heard alongside the one dated 28.4.2020. This was long after this appeal had been lodged and an application for stay sought before this court.

## F. Jurisdiction

36. In *Benson Ambuti Adega and 2 others v Kibos Distillers Ltd and 5 others* (2020) eKLR, the Supreme Court of Kenya quoting *Republic vs Karisa Chengo* (2017) eKLR held jurisdiction meant the authority which a court has to decide matters litigated before it, as limited by statute and or constitution that



a court could not take upon itself to exercise a jurisdiction it did not possess, otherwise its decision would amount to nothing for it must be acquired before any judgment was delivered.

37. In *Samuel Kamau Macharia & another v KCB Ltd and another* (2012) eKLR the Supreme Court of Kenya held a court could not arrogate to itself jurisdiction exceeding what was conferred by statute. In this matter the appellant had raised a jurisdictional issue that the value and developments on the suit land were beyond the pecuniary jurisdiction of the trial court. He brought before the court a valuation report dated 3.8.2020 and done by a licenced valuer James Kiigu Mururu of Jamu Real Ltd.
38. Other than being referred to the written submissions in support of the preliminary objection, the valuation report formed part of the appellants replying affidavit sworn on 23.11.2020 to the application dated 20.5.2020.
39. At paragraph 10 thereof the appellant deposed that the respondent should deposit security equivalent to the value of the land and developments at Kshs.14,000,000/= as per the valuation report which he attached as annexure marked ZK “3”. The appellant also requested for a scene visit to the locus in quo to justify the veracity of the same.
40. In my view, once the issue of the jurisdiction was raised by the filing of the preliminary objection on 1.2.2020, the court should have called for a valuation report on its own motion. The trial court did not have to wait even after the valuation report was brought to its attention, the trial court should have established if the suit land was falling under its pecuniary limits under Section 7 (1) of the *Magistrates Court Act 2015*. A valuation report is an expert evidence. That evidence was not controverted by the respondents. It meant the court was not possessed of jurisdiction and therefore was arrogating to itself that power which it did not have. See *Virginia Wantiga Mbiti v Nthiga M’Mbanya Kivevia* (2019) eKLR, *Geoffrey Macharia Muraga vs Nelson Nzioki Kimen & another* (2022) eKLR, *Phoenix of EA Assurance Co Ltd v S M Thiga t/a Newspaper Service* (2019) eKLR. The court proceeded to expunge the said valuation from the court record, yet it already formed part of the replying affidavit as annexure marked 2 K “3”. In absence of a contrary valuation report, my finding is that the trial court lacked the pecuniary jurisdiction to hear and determine the suit.
41. Having established that the trial court had no jurisdiction in the first instance whatever other orders issued were nullity ab initio. The suit was filed in a court without jurisdiction in the first instance. The order of injunction was made without jurisdiction. Having been made without jurisdiction it cannot be of any consequence. On that ground alone this appeal must succeed.
42. The above notwithstanding, even if the trial court had jurisdiction, there were no boundary record from either the county surveyor or physical planner showing the alleged encroachment by the appellant availed before the court for it to reach a finding that there had been encroachment and or illegal developments on the respondents parcels of land.
43. Consequently I reach a conclusion that the suit was filed before a court without jurisdiction and the orders were issued by a court without jurisdiction. I hereby proceed to strike out the suit in Tigania law courts. Any orders made in the said suit are hereby nullified. Parties are ordered to revert back to their respective positions before the commencement of the said suit.
44. Costs of the appeal and the lower court to the appellant.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 18<sup>TH</sup> DAY OF MAY, 2022**

**In presence of:**



Kamenchu for appellant

Mokua/Miss Nelima for respondent

**HON. C.K. NZILI**

**ELC JUDGE**

