**County Government of Kirinyaga v Njeru & another (Environment and Land Appeal 124 of 2013) [2022] KEELC 3011 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3011 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ENVIRONMENT AND LAND APPEAL 124 OF 2013**

**EC CHERONO, J**

**MAY 13, 2022**

**BETWEEN**

**COUNTY GOVERNMENT OF KIRINYAGA ..... APPELLANT**

**AND**

**STEPHEN MURIITHI NJERU ..... 1ST RESPONDENT**

**JAMES KAMAU MATHENGE ..... 2ND RESPONDENT**

## JUDGMENT

1. The appellant lodged this appeal vide a Memorandum of Appeal dated October 25, 2012 in which she seeking the following orders: -

    a. The appeal be allowed.

    b. The ruling and order of the learned trial Magistrate delivered on October 23, 2012 be set aside and be substituted with an order dismissing the applications dated August 2, 2012 and September 10, 2012.

    c. Costs of the lower court and this court be paid to the appellant.

    The Appellant has set out the followings grounds of appeal: -

    a. The learned trial magistrate erred in law and fact in allowing the application dated 10th September, 2012 whose effect was to overturn the judgment of the Nyeri HCCC No. 265 of 1997, and Court of Appeal number 2442 of 2000 which directed that all resultant subdivisions of L.R No. Baragwe/Raimu/38 be nullified and revoked.

    b. The learned trial magistrate erred in law and fact in failing to take into consideration the submissions made in opposition to the application dated September 10, 2012.

c. That the learned trial magistrate erred in fact and law in failing to take into consideration that his orders would cripple the operations of the appellant with regard to L.R No. Baragwe/ Raimu/38 which the appellant had acquired for purposes of expansion of Kianyaga Township, and this act had been acknowledged by the Court of Appeal in CA No. 245 of 2000.

d. That the learned trial magistrate erred in fact and law in issuing orders which would in essence result into subdivision of L.R No. Baragwe/Raimu/38 while at the same time holding that he has no jurisdiction to handle land matters.

e. That the learned trial magistrate erred in law and fact in failing to make a finding that his orders would affect several allottees of plots as issued by the appellant, and who were not served with the application yet the orders were adverse to their interests, to the benefit of just two individuals whose interests in the parcel of land cannot supersede the public interests.

f. The ruling was against the weight of the submissions made, case law cited and the prevailing circumstances.

2. The parties through their advocates on record agreed that the appeal be canvased by way of written submissions. The appellant filed her submissions on January 10, 2022 while the respondents filed theirs on May 5, 2022.

**Appellants Submissions: -**

3. The appellant submitted that the issue of jurisdiction by magistrates to handle land matters is now settle and that magistrates are now clothed with jurisdiction to hear and determine land and environment related disputes.

4. She further submitted that from the judgment in Nyeri HCCC No. 265 of 1997, it was clear that the County Council of Kirinyaga had acquired land parcel number Baragwi/Raimu/38 through compulsory acquisition for expansion of Kianyaga Town and that the original land owner was compensated promptly.

5. She submitted that the county council then proceeded to allocate plots to various individuals and further that the land was not to be subdivided and transferred to individuals as the same would have conferred absolute proprietorship which would mean that the County Council would have no control over the said parcels leading to loss of revenue.

6. She also submitted that the Court of Appeal confirmed this position through orders issued in Nyeri HCC No. 265 of 1997. In a subsequent meeting, the then council of Kirinyaga allocated residential plots and nowhere was it stated that the land was to be subdivided and resultant portions to issue.

7. She submitted that it was illegal for the respondents to obtain title deeds from the same parcels of land that belongs to the County Council of Kirinyaga and that the order the respondents herein challenged was supposed to give effect to the judgment of Nyeri High Court and the Court of Appeal that the whole of the suit land should be intact and belongs to the County Council.

8. He submitted that to set aside that order meant that the land was to be sub-divided and transferred to individuals which would go against the letter and the spirit of the Nyeri High Court and the Court of Appeal judgments.

9. He submitted that the best the respondents would have done was to apply for allocation of plots, but not to get titles from the land.

10. He submitted that the alleged minute number WTPM &H/15 dated 19/7/2001 was not annexed to the affidavit in support of the application dated 10th September 2012 yet the court proceeded to allow the prayer nullifying and setting aside the purported minute.

11. He therefore submitted that the appeal has merits and ought to be allowed with costs.

**Respondents' Submissions:-**

12. The Respondents submitted that since the issues and interests touching on land parcel No. Baragweraimu38 were substantially addressed in the High Court and finally the Court of Appeal, the lower court could not entertain and or issue orders touching on the same property after the superior court had made findings and issued decrees.

13. They submitted that the appeal has no merits as the Senior Resident Magistrate had no powers to overturn the judgment and decrees of the two superior courts therefore his ruling of 23.10.2013.

14. They submitted that the appellant actively participated in the proceeding before the High Court and was aware that sub division had been effected and cannot feign ignorance of the decree of the two courts and thus they are estopped from appealing and even going against the orders of the superior court.

15. They submitted that the matter before the trial court was res judicata and cannot be reopened in any form or manner as the parties in the trial court are claiming under the same parties who had litigated in the high court as well as the superior court.

16. They submitted that the Appellant's interest is to frustrate them owing to the fact that they genuinely and legally took possession of the suit property and thus their appeal is an abuse of court process.

17. They submitted that since the High Court had similar jurisdiction as this Honourable Court and accordingly this Court cannot entertain an appeal and quash the decree, judgment and orders made by a court of similar/concurrent jurisdiction.

18. They submitted that local authorities were phased out and the court cannot issue orders in futility as an amendment ought to have been effected long before bringing on board the County Government of Kirinyaga.

19. They thus submitted that this Appeal be dismissed with costs to the respondents

**Analysis: -**

20. I have considered the Memorandum of Appeal, Record of Appeal, Supplementary Record of Appeal, the parties rival submissions and the applicable law.

21. This appeal involves a ruling and order that was delivered by the trial court with respect to an application dated September 10, 2012.

22. I have looked at the said application which is at pages 9 – 12 of the Record of Appeal. The application was mainly brought under order 45 rule 1 of the *Civil Procedure Rules*, whereby the applicants had sought the following orders: -

    a. That the Kirinyaga County Council Minute number WTPM & H/15 dated 19/7/2001 purporting to rectify orders of the court of appeal in respect of land parcel Numbers Baragwi/ Raimu/38 be nullified and set aside.

    b. That the decree of this court dated(sic) 29/5/2012 (attached) ordering cancellation of registration of parcel of Numbers Baragwi/Raimu/2281 to 2305 be vacated and set aside.

c. That the cancellation of the land titles be reinstated in the registers.

d. That the allotees of the Kirinyaga County Council after the case was heard ex-parte be prevented by an injunction from entering, working transferring, or in any way interfering with land parcels Numbers Baragwi/Raimu/2281 to 2305.

e. That the OCS Kianyaga Police Station be ordered to implement and therefore enforce the orders of the court.

23. Order 45 rule 1 of the *Civil Procedure Rules* provides that: -

1. Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

24. From the above provisions of the law, it is apparent that for a litigant to be successful in an application for review, He /She must prove the following :-

a. That He / She has discovered new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made; or

b. There is sufficient reason to obtain a review of the decree or order.

c. The application has been made without unreasonable delay.

25. I have looked at the ruling which is at pages 86 and 87 of the Record of appeal. The Trial Magistrate allowed the said application on the following grounds:-

> " The consent was filed recorded on May 25, 2012. Now the Land Registrar Act came into effect on April 14, 2012. The Act under Section 101 vests the jurisdiction to hear and determine disputes actions and proceedings concerning land on the environment and Land Court.
>
> My view is that this court had no jurisdiction then to endorse or in any way hear or determine the dispute herein since it concerns land.
>
> In the circumstances since the court lacked jurisdiction the orders given ought to be set aside. Consequently, I allow the notice of motion application dated 10th September, 2012 as prayed. Costs in the cause."

26. It is evident that the trial court allowed the application on grounds that it did not have the jurisdiction to adopt the consent recorded on May 25, 2012.

27. It is trite law that jurisdiction is everything and without it, a court is required to down its tools. This position was held in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd*. (1989) where 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."

28. From the foregoing, once a Court discovers that it did not have jurisdiction to determine a suit, it was required to down its tools and not make any further orders for review.

29. It is imperative to note that jurisdiction is not a ground for review but for appeal because it is a matter of law and not fact. This position was held in the case of *Manjula Dhirajlal Soni v Dukes Investments International Limited & 2 others* [2018] e KLR, whereby the court held that:-

> "I am of the view that when a court proceeds to exercise jurisdiction it does not have, that is not a mistake or error apparent on the face of the record but an error of judgment that goes to the merit of the decision. Such error in my view can only be corrected through an appeal process. If a judge is to be called upon to review his decision on the ground of lack of jurisdiction, that would be tantamount to calling upon the judge to sit in an appeal against his own decision. In the case before me, the Bank has contended that the decision of Nyamweya J. was null and void and of no legal effect. A court cannot be called upon to declare its own decision null and void. It is only an appellate court that can do that."

30. It is therefore my view that when the trial court set aside the consent order and allowed the application dated 10th September, 2012, the court sat on an appeal against its decision whereas the court had already been rendered functus officio.

31. The trial magistrate therefore, erred in law and fact by setting aside the said consent order and by allowing the said application on grounds that it did not have jurisdiction.

32. At this juncture, it is evident that the trial court misdirected itself by failing to determine whether the application before it had sufficient grounds for review as set out under order 45 (1) of the *Civil Procedure Rules,* 2010.

33. Given that this is a first appeal, this Court is allowed to look at the facts of the case afresh and give its own decision. Having considered the record, the facts and the applicable law, it is my considered view that this appeal is merited.

**Conclusion: -**

34. For all the reasons given herein above, I am satisfied that the trial magistrate misdirected himself by purporting to review a consent orders he had adopted on October 23, 2012 by setting aside on grounds that he had no jurisdiction then to endorse and/or in any way hear or determine the dispute as it concerned land. Even after admitting that he had no jurisdiction, the learned magistrate in a paradoxical manner and without any basis or analyzing the facts and the law allowed an application dated 10th September, 2012. The upshot of my finding is that this appeal is allowed in the following terms-;

a. The ruling and order of the learned trial Magistrate delivered on October 23, 2012 be and is hereby set aside.

b. The trial Court file is remitted to the lower Court for hearing before any other Magistrate on priority basis.

c. Mention before the Chief Magistrate on 23rdMay 2022 for directions.

d. Status quo as regards the Judgment and Decree of the High Court at Nyeri (HCCC No. 265 of 1997 and the Court of Appeal No. 2442 of 2000 to be maintained.

e. Each party to bear its own costs.

**JUDGMENT READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 13TH MAY, 2022.**

**.....**

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of:-

1. Ms Wambui holding brief for Maina Kagio for Appellant

1st Respondent – absent

2nd Respondent – present

Kabuta – Court clerk.