



Indar Singh Gill Limited v Muthigu t/a Solace Matrix Enterprises (Environment and Land Appeal E052 of 2024) [2025] KEELC 4139 (KLR) (26 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4139 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E052 OF 2024**

JG KEMEI, J

MAY 26, 2025

BETWEEN

INDAR SINGH GILL LIMITED APPELLANT

AND

**JOYCE WANJIKU MUTHIGU T/A SOLACE MATRIX
ENTERPRISES RESPONDENT**

*(Being an appeal from the entire Ruling and Order of Hon S A Opande,
PM at Nairobi delivered on 8/4/2024 in MCELC No 284 of 2021)*

RULING

1. The Appellant, vide a Memorandum of Appeal dated 20/04/2024 lodged an appeal against the ruling of Hon. S.A. Opande Principal Magistrate at Nairobi MCELC No. E284 of 2021 delivered on 8/04/2024. The grounds of appeal are as follows;
 - a. That the Learned Magistrate erred in law and in fact in setting aside the default judgment even after finding that the Respondent's application seeking to set aside default judgment lacked merit.
 - b. That the Learned Magistrate erred in law and in fact in striking out the Appellant's suit without allowing parties to address him on the issue of jurisdiction.
 - c. That the Learned Magistrate erred in law and in fact in finding that the accrual of mesne profits during the pendency of the suit ousted the jurisdiction of the Court.
2. The Appellant therefore prays for orders that;
 - a. The Respondent's Notice of Motion seeking to set aside the judgment dated 7/12/2023 be struck out.



- b. That the Judgment of the trial Court entered on 23/06/2022 be restored in terms of the Decree issued on 8/09/2022.
 - c. Eviction order against the Respondent be issued.
 - d. Costs of the Appeal be awarded to the Appellant.
3. The suit itself was commenced by way of a Plaint dated 6/08/2021 by the Appellant who was the Plaintiff. The Appellant sought for orders of vacant possession, rent arrears and interest thereon. It also sought for accrued service charge and mesne profits together with interest thereon. Summons to enter appearance were issued and duly served upon the Respondent but she failed to enter appearance. Subsequently, an Interlocutory judgment was entered on 7/02/2022. Procedurally, as an undefended suit, the matter proceeded to formal proof hearing on 23/2/2022. The trial Court being satisfied that the Plaintiff had proved her case on a balance of probability, entered judgment in favour of the Plaintiff on 23/6/2022. A decree and Certificate of Costs was duly issued on 8/09/2022 and an eviction order issued on 8/08/2023.
 4. It is upon being served with the Eviction order dated 8/08/2023 that the Respondent moved the Court vide the application dated 7/12/2023 seeking to set aside the ex parte judgment and the consequential orders arising therefrom. The Respondent also sought that the draft defence annexed thereto be admitted out of time and the matter proceeds to pre-trial conference. The application was premised on among other grounds; that she had not been served with valid summons to enter appearance.
 5. The Application was canvassed by way of written submissions and the Court delivered its Ruling on 8/04/2024. The Court held that the Applicant had been duly served with summons to enter appearance hence there was no valid reason as to why she did not honour the summons. It was further held that the Applicant had not attached a draft defense for the Court to decide as to whether there were triable issues.
 6. The Court however noted that the Respondent to the application, the Appellant herein, averred in its submissions that the Applicant therein was in rent arrears amounting to Kshs. 22, 087, 440.00 at the time of the application. The Court therefore, on its own motion, found that in view of the outstanding rent arrears, it lacked jurisdiction to hear and determine the matter. Consequently, the Court struck out the suit and set aside the interlocutory judgment with all consequential orders emanating thereof.
 7. It is the said Ruling that is subject of this Appeal.

Directions on Submissions.

8. When the appeal was listed for directions, it was directed that the appeal be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellant filed its submissions dated 14/03/2025. On the other hand, the Respondent's submissions were not on record despite service of the Court's directions.

The Appellant's submissions.

9. The litigation history of the matter was highlighted and the applicant submits on each of the grounds of appeal raised in its Memorandum of Appeal. On the first ground, as to whether the trial Court erred in setting aside the default judgment even after finding that the Respondent's application seeking to set aside default judgment lacked merit, the Appellant argues that after the Court finding that the



interlocutory judgment entered thereon was regular and that there was no basis of setting it aside, the Court ought to have dismissed the application.

10. On the second ground that the Court erred in striking out the Appellant's suit without allowing parties to address him on the issue of jurisdiction, the Appellant submits that neither of the parties raised the issue of the jurisdiction. It argues that the Court simply decided without inviting parties to submit to the issue. The decision on jurisdiction therefore offended the principles of natural justice that requires parties to be heard.
11. Finally, on the last ground of appeal, being whether the accrual of mesne profits during the pendency of the suit ousted the jurisdiction of the Court, the Appellant submits that at the time of filing the suit, the trial Court had jurisdiction to hear and determine the suit. However, at the time of determining the Respondent's application, the rent arrears were in the sum of USD 138,046.56 (Kshs. 22,087,440). The Appellant argues that Jurisdiction must be acquired before judgment. It is not determined after judgment. The appellant opined that it is therefore not correct for the Court to hold that it lacked jurisdiction on the basis of accruals of interest and mesne profits arising post judgment. The Appellant argues that punishing a successful party by setting aside a judgment and striking out the suit on account of accrual of interest and mesne profits awarded in the judgment defeats the power of the Court to award interest derived from Section 26 of the Civil Procedure Act.

Analysis and Determination.

12. Upon considering the Memorandum of Appeal, the record and Submissions filed by the Appellant, I find that the issues that arise for determination are;
 - a. Whether the Learned Magistrate erred by striking out the suit for want of pecuniary jurisdiction post judgement
 - b. Which orders should the Court issue?

Whether the Learned Magistrate erred by striking out the suit for want of pecuniary jurisdiction post judgement

13. As a first appellate Court, this Court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial Court. The principles which guide a first appellate Court were summarized in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...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 that respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”

14. Similarly, in the case of *Peters –vs- Sunday Post Ltd* [1958] EA 424 Sir Kenneth O' Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine



whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate Court might itself have come to a different conclusion...”

15. Before delving further, the Appellant contends that the Learned Magistrate erred in raising and dealing with an issue of Jurisdiction yet neither of the Parties had raised it. It argues that the Magistrate violated the principle of natural justice as it was condemned unheard. In my view, I find no fault on the part of the Magistrate to that end. Jurisdiction of a Court is fundamental. It does not have to be raised by any party. The Court may as well pick it out on its own motion.
16. In *Anaclek Kalia Musau –vs- Attorney General & 2 Others* [2020] eKLR, Civil Appeal 111 of 2017, the Court of Appeal in determining a jurisdictional issue which was never raised by the parties to the suit stated as follows:

“..... A jurisdictional issue is fundamental and can even be raised by the Court suo moto as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another vs Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

“What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and decide thereon without the same being pleaded...”

17. Turning to the main issue for determination, as was stated in the case of *The Owners of Motor Vessel “Lilian s” vs. Caltex Oil (K) Ltd* [1989] KLR 1, it would be an act in vain for a Court to hear and determine a matter if it lacks the jurisdiction to do so. In the said case, the Court of Appeal guided as follows:

“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.”

18. The Supreme Court in *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, held as follows:

“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 by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings

Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power



on Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a Court or tribunal by statute law."

19. In Kenya, the Subordinate Courts, of which the Magistrates Courts are part of, are set up under Article 169 of *the Constitution*. The Magistrates' Court's jurisdiction to hear and determine environment and land cases is established under Section 26 (3) and (4) of the ELC Act and states that;

"

"4. subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle;

- a. disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
- b. matters of a civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.

4. Appeals on matters from the designated magistrate's Courts shall lie with the Environment and Land Court."

20. Section 9 of the Magistrates' Court Act, CAP 8D stipulates the particulars of the said jurisdiction and states that:

"A magistrate's Court shall—

- a. in the exercise of the jurisdiction conferred upon it by Section 26 of the *Environment and Land Court Act* (Cap. 8D) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to-
 - i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - ii. compulsory acquisition of land;
 - iii. land administration and management;
 - iv. public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - v. environment and land generally."

21. Section 7 (1) of the Magistrates' Court Act provides for the pecuniary jurisdiction of different ranks of Magistrates. The pecuniary jurisdiction is capped at Twenty Million Shillings, where the Court is presided over by a Chief Magistrate, which is the highest rank in the Magistracy.

22. The Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR held that;

"Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a



complaint one in the Court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate Court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction.”

23. Similarly, in *Joseph Muthee Kamau & Another v David Mwangi Gichure & Another* [2013] eKLR, this Court held: -

“When a suit has been filed in a Court without jurisdiction, it is a nullity. Many cases have established that; the most famous being the case of *Kagenyi v Musirambo* [1968] EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the Court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

24. In the instant appeal, it is evident that the Lower Court had pecuniary jurisdiction at the time filing the suit and as well as at the point of entry of Judgment. Jurisdiction of the Court continued even during formal proof and subsequently a Decree was issued on 8/09/2022. According to the Decree, the principal amount plus interest amounts to Kshs. 9, 552, 931.97/= together with costs of Kshs. 343,063.25/=. The total Decretal amount is Kshs. 9, 895,995.22/=. This is within the pecuniary jurisdiction of a Principal Magistrate.

25. I agree with the Appellant’s submission that the grant of interest and mesne profits in the judgment was well are within the learned Court’s discretion. Having awarded interest and mesne profits in the judgment, the trial Court could not use the fruits of the award of interest and mesne profit as basis to hold that jurisdiction had been ousted on account of accruals of interest and mesne profits arising post judgment.

26. As correctly submitted by the Appellant, Section 26 of the *Civil Procedure Act*, which provides that:

“26.

- (1) Where and in so far as a decree is for the payment of money, the Court may,

in the decree, order interest at such rate as the Court deems reasonable to

be paid on the principal sum adjudged from the date of the suit to the date of

the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.”

27. In my view pecuniary jurisdiction of a Court is determined from the pleadings at the filing of the suit and entry of Judgment. It cannot be determined at execution while computing interest that was awarded to a successful party. That will be tantamount to capping interest payable on the principal amount. This is so because a Court cannot tell when the Judgment –Debtor is likely to settle the decretal amount. In any event, a Decree only lapses after 12 years as per the *Limitation of Actions Act*.



28. It is therefore my finding that the Learned Magistrate erred in striking out the suit for want of jurisdiction on the basis that rent arrears had accrued to a sum over Kshs. 22,087,440 as at 8/04/2024 way after Judgement had been entered.

b.Which orders should the Court issue?

29. Having found that the Learned Magistrate erred in striking out the suit, the said order is hereby set aside and the Judgment entered on 23/06/2022 and the Decree issued on 8/09/2022 are hereby restored.

30. The Appellant also sought that the Respondent's Notice of Motion Application seeking to set aside the default judgment dated 7/12/2023 be struck out. From the impugned Ruling, the Judgment was not set aside due to the merits of the Respondent's application but on the alleged want of jurisdiction. The Learned Magistrate categorically found that the Respondent's application was not merited as she had not given justifiable reason for not entering an appearance. Neither had she attached a Draft Defence as is a requirement in setting aside a regular judgment. The Respondent chose not to participate in this Appeal. In the absence of an appeal by the Respondent, this Court has no basis of interfering with the Learned Magistrate's finding.

31. Further, the Appellant prayed for an eviction order to be issued against the Respondent. From the Record of Appeal, it is evident that an Eviction Order had already been issued on 8/08/2023. Having restored the Judgment, the consequential orders emanating therefrom are equally restored. There is therefore no basis of granting another eviction order.

32. On the issue of costs, costs are at the discretion of the Court and in any event awarded to a party who is successful. However, having considered the circumstances of this case, this Court directs that there shall be no orders as to costs of the appeal.

33. Final orders for disposal

- a. The Upshot of the foregoing is that the Court finds the Appeal merited in so far as setting aside the order striking out the suit and restoring the Judgment entered by the trial Court on 23/06/2022 and all the consequential orders emanating therefrom.
- b. The Respondent's application dated 7/12/2023 stands dismissed.
- c. There shall be no orders as to costs.

34. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 26TH DAY OF MAY, 2025 VIA MICROSOFT TEAMS.

J.G. KEMEI

JUDGE

Delivered Online in the presence of:

1. Mr Mwai Muthoni H/B for Mr Njuguna
2. N/A for the Respondent
3. CA – Ms. Yvette

