Rafiki Limited & 2 others v Nappo & 2 others (Environment and Land Appeal E050 of 2022 & E053 of 2023 (Consolidated)) [2025] KEELC 4362 (KLR) (11 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4362 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL E050 OF 2022 & E053 OF 2023 (CONSOLIDATED)

SM KIBUNJA, J

JUNE 11, 2025

BETWEEN

RAFIKI LIMITED .... 1ST APPELLANT

MASSIMO NATIVI .... 2ND APPELLANT

DANIELE LO COCO .... 3RD APPELLANT

AND

RITA NAPPO .... 1ST RESPONDENT

MASSIMO NATIVI .... 2ND RESPONDENT

DANIELE LO COCO .... 3RD RESPONDENT

(Being an appeal from the ruling of Hon. J. B. Kalo, CM, delivered on 21st November 2022 in Mombasa CMELC No. E669 of 2022)

JUDGMENT

1. These appeals were as a result of dissatisfaction by the appellants against the ruling and orders of Hon. J.B Kalo delivered on 21st November 2022 in MCELC E669 of 2022. The appellants in ELCA No. 50 of 2022 commenced their appeal through the memorandum of appeal dated 2nd December 2022, raising nine (9) grounds summarized as follows:

   a. The learned trial magistrate erred in law by determining the preliminary objection and the application on the basis of section 3(2) of the Magistrate's Court Act Chapter 10 of Laws of Kenya that was on 2nd January 2016, repealed by section 22 of the Magistrates' Court *Act No. 26 of 2015*.

   b. The learned magistrate erred in law and in fact by following the per incuriam decision of Kemei J. in Sustainable Management Service vs New Mitaboni FCS (2017) eKLR on section 3(2) of

the Magistrates' Court Act Chapter 10 of the Laws of Kenya, a statute that had already been repealed.

c. The learned magistrate erred in law and fact by failing to distinguish section 12 of the *Civil Procedure Act*, which is specific to land cases from section 15 of the said Act, which applies to other suits.

d. The learned trial magistrate erred in law by holding that section 12 of the *Civil Procedure Act* was not applicable in the suit.

e. The learned magistrate erred in law by failing to determine the preliminary objection founded on section 3(3) of the *Law of Contract Act* in relation to the suit against the 2nd and 3rd appellants.

f. The learned magistrate erred in law and fact by failing to appreciate that Magistrates' courts are established under Article 169 (1) (a) of *the Constitution* and given effect by the Magistrates' Court *Act No. 26 of 2015* and not the repealed Magistrates' Court Cap 10.

g. The learned magistrate erred in law and fact by failing to hold that the appellants and respondent reside in Watamu, Kilifi County, and not Nairobi or Mombasa, and hence the suit should have been filed in Kilifi or Malindi.

h. The learned magistrate erred in law and in fact by failing to strike out the suit for want of jurisdiction under section 12 of the *Civil Procedure Act*.

i. The learned magistrate erred in law and fact by failing to strike out the suit against the 2nd and 3rd appellants for want of jurisdiction under section 3 (3) of the *Law of Contract Act*.

2. The appellants sought for the following orders:

a. This appeal be allowed.

b. The Appellants' Notice of Preliminary Objection dated 22nd September 2022 be allowed with costs.

c. The suit against the 1st Appellant be struck out with costs and the suit against the 2nd and 3rd Appellants to be dismissed with costs.

d. The Ruling by the Honourable Magistrate be varied and be set aside other than on the finding that the Respondent's Notice of Motion application dated 5th September 2022 was without merit and was properly dismissed with costs.

e. Costs of this appeal be paid by the Respondent.

The appellants also filed the record of appeal dated 24th July 2023.

3. The appellant in ELCA No. 53 of 2022 filed her appeal through the memorandum of appeal dated 7th December 2022, raising ten (10) grounds summarized as follows:

a. The learned trial magistrate erred in failing to balance the interests of justice in reaching to his decision.

b. The learned trial magistrate erred in failing to find that, the fact that the respondents were demanding service charge from her is an indication that she was lawfully in occupation of Villa No. 4A situated in Kilifi/Jimba/1544.

c. The leaned trial magistrate erred in failing to find that her failure to pay service charge is not lawful ground to deny her access, occupation or quiet enjoyment of the villa she had bought and paid for in full.

d. The learned trial magistrate erred in failing to find that the appellant had right to access, occupation and enjoyment of the suit property until the matter is heard and determined by the Court.

e. The learned trial magistrate erred in failing to find that though in the opinion of the appellant the agreement, which was the subject matter of the suit, was null, and void, a determination would be made by the court at the end of the trial.

f. The learned trial magistrate erred in holding that the appellant was seeking for a mandatory injunction, whereas her application was crystal clear she was seeking for a temporary order of injunction against the respondents.

g. As a consequence of the above error, the learned trial magistrate erred by applying the principles of a mandatory injunction in determining a prayer for temporary injunction.

h. The learned trial magistrate erred in finding that the suit property was residential in which she had personal and household items and would suffer irreparable damage, when denied access.

i. The learned trial magistrate erred in failing to find that the appellant has a prima facie case given that registration of the long-term lease failed due to rejection by the Land Registrar, Kilifi.

j. The learned trial magistrate erred in failing to protect the ends of justice by granting the order of temporary injunction.

4. The appellant prays for the following orders that:

a. The learned trial magistrate's ruling delivered on 21st November 2022 be set aside, to the extent of falling to grant the order of temporary injunction and the said order be and hereby granted by this court.

b. Costs of this suit together with interest thereon at such rate and for such period of time, as this Honourable court may deem fit to grant.

The appellant also filed the record of appeal dated the 14th March 2023.

5. The two appeals were by consent consolidated for hearing and determination on the 30th July 2024, with the record of ELC No. 50 of 2022 being the lead file. For purposes of the judgement, and so as to avoid confusion, the appellants in ELCA No. 50 of 2022 will be referred to as the appellants, while the appellant in ELCA No. 53 of 2022 will henceforth be referred to as the respondent.

6. The learned counsel for the appellants and respondent filed their submissions dated the 15th November 2024 and 30th September 2024 respectively, which the court has considered.

7. The court has identified the following issues for its determinations in the consolidated appeals:

a. Whether the trial court had geographical/territorial jurisdiction in the suit.

b. Whether the appellants' and respondent's appeals have merits and what orders should issue.

c. Who bears the costs in each of the appeals?

8. The court has carefully considered the grounds on the memorandums of appeal, records of appeal, submissions by the learned counsel, superior courts decisions relied upon and come to the following determinations:

   a. This court's duty as a first appellate court is to re- evaluate all the evidence availed before the lower court and to reach its own conclusions, taking into account the fact that it had no opportunity of hearing or seeing the parties as they testified, and make an allowance in that respect. See the cases of Selle & Another v Associated Motor Boat Co. Limited & others [1968] EA 123, Ephantus Mwangi & Anor v Duncan Mwangi Wambugu 1982 – 88 ICAR 278, Uganda Breweries Ltd v Uganda Railways Corporation [2002] 2 EA 634 and John Malembi v Truphosa Cheredi Muderubeu & 2 others [2019] eKLR.

   b. That from the trial court's typed proceedings and the Hon. trial magistrate's ruling at pages 125 to 132 and 134 to 141 of the appellants' and respondent's records of appeal respectively, the notice of motion dated 5th September 2022, and the notice of preliminary objection dated 22nd September 2022, were canvassed together, and determined through the ruling delivered on the 21st November 2022, which is subject matter of the appeals herein. The appellants through the first ground of their preliminary objection challenged the geographical jurisdiction of the trial court to determine the suit under section 12 of the *Civil Procedure Act*, and in his determination, the learned trial magistrate inter alia held as follows:

      > "............They raised the issue that the court lacks jurisdiction as under section 12 of the *Civil Procedure Act*. This section may not be really applicable in this case but the court is moved to looking at other factors may potentially arise in the future with regards to jurisdiction and the agreements entered into by the parties in regards to disputes amongst the parties of the agreement."

      The trial court cited the cases of Oraro v Mbajjaa [2005] eKLR and Mukisa Bisuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 at page 700, where both courts agreed that a pure point of law is raised where facts are not in dispute. In response to that preliminary objection, the respondent filed the grounds of opposition dated 11th October 2022, which stated inter alia that there was clause 4(5) in their agreement to the effect that the competent courts to handle any dispute arising were either Mombasa or Malindi and that the suit can be transferred to Malindi Court, instead of striking it out.

   c. I understand the trial court to say that the geographical jurisdiction provisions do not apply to the suit because of among others, the provision in the above stated clause and that issue is contested and evidence may need to be considered before a determination can be made. To start with, from the pleadings filed, there is no contestations on where the cause of action arose and parties reside. The location of the suit property is also not contested and no evidence would be required to be adduced for consideration before a determination can be made. The question that comes to the fore, and requires this court's determination is whether the terms on the parties' contract can override a clear provision of a statute. In the case of Korea Nyamai v Neema Parcels Limited [2021] eKLR the learned judge held as follows:

      > "My reading on the decisions captured by the superior courts in Simon Kiarie V Samuel Muigai Thuku [2005] eKLR, Justus Kyalo Mutunga V Laph Singh Harnan [2021] eKLR tend to settle the issue on territorial jurisdiction as non-responsive based on the provisions in the Magistrates Courts Act 2015. The time honored principle on jurisdiction is to give effect to both pecuniary and subject matter

jurisdiction. Procedurally, it is unclear on the inconvenience in which a litigant would be subjected to in litigating a claim just outside his or her front door in gross disproportionate to the defendant's convenience. The concept on territorial jurisdiction to me has a widespread application especially taking cognizance of our legal system and administration of justice. I have in mind public interest factors to a litigation;-

a. The administrative factors namely crowded dockets in our legal system.

b. The law governing the cause of action.

c. Local interests in deciding localized controversies at home.

d. Right to access justice under article 48 of *the constitution*.

e. The tenets of forum non-convenience and the duty of fairness of the trial.

At the outset to put it simply, the requirements that must be met before a court properly undertakes to umpire adjudication of civil disputes is to take notice of subject matter and territorial jurisdiction. In particular, adopting a view popular with the current jurisprudential question on personal jurisdiction of magistrates being of universal character and not limited to the local limits/county or sub county. With this trajectory under the provisions of the Magistrates Courts Act as read with section 15 of the *Civil Procedure Act*, there is no dispute that the only divisibility in the ranking of the magistrates is at the scale of pecuniary jurisdiction.

It therefore behoves the Court in the legislative scheme that emerges from a combined reading of sections 11, 12, 13, 14 and 15 to give effect to the competence on personam and subject matter jurisdiction. Implicit in these emphasis are cumulative components of reasonableness of access to justice in Article 48 and the due process clauses under Article 50 of *the Constitution*. The civil court is primarily and expressly required under the provisions of section 15 to protect the Defendant against the burdens of being sued and litigating in distant or inconvenience forums, in my view giving credence to this provision on territorial jurisdiction. It also acts to ensure that Counties through their respective Courts do not reach out beyond the limits imposed by their Counties as core equal sovereign in our system of government. So, territorial jurisdiction need not be confused with personam jurisdiction over things or cause of action. Justice is idea of giving each person his or her own fair due process as a matter of constitutional right.

The system must imbue in those who have reason to seek justice in our various Courts a sense of the fairness of the system of laws, processes and procedure underpinned primarily on access to justice. Jurisdiction being the authority in which judges and magistrates take cognizance of the cause of action which normally constitutes a subject matter ordinarily falls within the local limits of that Court. In my considered view jurisdiction as generally legislated by Parliament and understood in our system of Court is a combined effect over the parties' territorial jurisdiction, the nature of the claim and its relationship to pecuniary measure. The *Civil Procedure Act* subject to the interpretation on territorial jurisdiction gives no room for a plaintiff or a suit to be filed against the defendant by any original process in any county, or sub-county than that whereof he or she is a resident or carries business at the time of service of summons for the claim.

Where is the connection? As discerned from the law there is an overlap between the territorial and the subject matter jurisdiction save for transactional or transnational contractual and commercial transactions normally transcending more than one venue as a focal point on the cause of action. I believe a better approach to rationalize the application of territorial jurisdiction is to sever it from that of personam which historically created the position of a "District Magistrate" and the phrase – "Local District." This new structure clarifies by recognizing that statute imposed limitations on personam jurisdiction reach."

This court resonates with the holding of the learned judge in the above case. It follows that geographical jurisdiction should be separated from the personam jurisidiction of the magistrate's court, and the overriding objective should be the access to justice. That from the filed pleadings, the cause of action arose in Watamu, Kilifi County; the parties are residents in Watamu, Kilifi County, and the suit property is also situated at Watamu, Kilifi County. In compliance with sections 12 and 15 of the *Civil Procedure Act*, the suit should have been originated or commenced in the nearest court with jurisdiction, which is Malindi Law Courts. This not only make economical and legal senses but it is also fair that the suit should have been filed in the nearest court with jurisdiction. The court finds the learned trial magistrate erred in not upholding the respondent's preliminary objection on the ground of territorial jurisdiction.

d. The learned trial magistrate's ruling of 21st November 2022, did not address or pronounce himself on the second ground in the preliminary objection of whether or not the 2nd and 3rd appellants are proper parties in the suit. From the respondent's pleadings and the lease agreement, the two executed the sale agreement on behalf of the 1st appellant, and on that basis they can be sued, as the respondent claims inter alia misrepresentation of facts by them. In the case of Riccatti Business College of East Africa Limited v Kyanzavi Farmers Company Limited [2016] eKLR the Court of Appeal held that;

> " The court may lift the corporate veil in exercising its inherent jurisdiction to do justice and fairness for the ends of justice. This jurisdiction may be exercised only in special circumstances where the court finds improper conduct, fraud or when a company is a sham, acting as an agent of the shareholders or evading tax revenues."

I notice the appellants have through their grounds of opposition dated 11th October 2022, challenged the respondent's contestations on the roles played by the 2nd and 3rd appellants, and I find the ground does not amount to a pure point of law that can be raised and determined without considering evidence. That ground therefore fails and the prayer for the striking out of the suits against the two equally fails. The above findings generally settles the appellants' appeal in ELCA No. 50 of 2022, except on the issue of costs that will be addressed at the tail end of this judgement.

e. Looking at the notice of motion dated the 5th September 2022, it is clear prayers (b) and (c) seeks for temporary order of injunction against the appellants. I have perused the grounds on the face of the application, the depositions on the supporting affidavit and the replying affidavit and have not seen any fact(s) to indicate or suggest that the respondent was not in possession of the suit property by the time the application was filed. I also have not seen any ground or deposition upon which the trial court based it finding that "...although the prayer for injunction was cleverly worded to appear like a prayer for a temporary injunction to preserve the subject matter, it is actually a mandatory injunction that is seeking to reinstate the plaintiff into the villa...." The first and second notices marked "RN1" and "RN2" referred to at paragraph 2 of the supporting affidavit, only stated that if the payment demanded is not

received by the indicated dates "..,we will have no choice but to deny you entry at Rafiki Resort Management...." That cannot in any way be construed to mean the respondent had already been denied access to the villa, suit property, but is a threat that access may be denied in the future should the payment not be received as demanded. The respondent was therefore in order to seek for temporary order of injunction as she did through the said application, and the finding by the learned trial magistrate that the injunction prayed for by the respondent is a mandatory injunction, was not based on available facts/evidence.

f. The court has to therefore proceed to determine whether the respondent had met the threshold for the temporary injunction sought in her application to be issued. The respondent had to satisfy the principles in the case of Giella v Cassman Brown [1973] EA 358, as was reiterated in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others *CA No.77 of 2012* [2014] eKLR where the Court of Appeal held that;

> "...in an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially"

g. In the case of Mrao Ltd v First American Bank Of Kenya Ltd [2003] eKLR the Court of Appeal considered what a prima facie case was and stated that:

> "... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

The respondent produced a long-term lease dated 7th August 2020 for a term of 99 years, and which she bought for at a consideration of 150,000 Euros. Her deposition that she paid the purchase price in full plus other stated dues has not been disputed or rebutted by the appellants. She also produced an extract of the title showing that the suit property was encumbered with the said lease on 18th November 2020. The respondent has therefore established the existence of a prima facie case with a probability of success by showing that she paid the purchase price and therefore possess some legal rights over the suit property.

h. On irreparable injury, the court in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR stated that;

> "Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury."

From the available factual materials presented through affidavit evidence, the respondent is at real risk of being denied access to the suit property, despite her having fully paid the entire

purchase price, invested in furnishing it and taken possession, merely because of the dispute over payment of the service charge/condominium fees. I find she will most likely be exposed to irreparable injury/loss if temporary injunction order is not issued to enable her continue having access to the suit property pending the hearing and determination of the suit.

i. The last principle of balance of convenience is described in the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR which defined the concept of balance of convenience as:

> "The meaning of balance of convenience in favor of the plaintiff' is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiff's' to show that the inconvenience caused to them be greater than that which ma)' be caused to the defendant's inconvenience be equal, it is the plaintiff who suffer.
>
> In other words, the plaintiff have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting"

That weighing the balance of convenience between the parties' in issuing or denying the injunction order as the suit is heard and determined, I find the respondent would be greatly prejudiced than the appellants if the order is not issued. The balance of convenience therefore tilts in favour of granting the order sought by the respondent in the said notice of motion. The foregoing determinations fully addresses the respondent's appeal in ELCA No. 53 of 2022, except on the issue of costs that will be dealt with, herein below.

j. Under section 27 of the *Civil Procedure Act*, costs follow the event unless where there is a good reason for the court to depart from that common position. In view of the fact that the appellants and the respondent have partially succeeded in their respective appeals, that were greatly necessitated by the impugned ruling by the trial court, I find it fair and just for the costs in both appeals to abide the outcome of the suit, which is still pending before the lower court.

9. From the foregoing determinations on both appeals as consolidated, the court finds and orders as follows:

a. That ELCA No. 50 of 2022, is allowed limited only to upholding the appellants'/defendants' preliminary objection on the ground of territorial jurisdiction.

b. That ELCA No. 53 of 2022 is allowed as prayed and the orders of the trial court in the ruling delivered on 21st September 2022 dismissing the application, are set aside and substituted with an order granting temporary order of injunction in terms of prayer (c) of the notice of motion dated 5th September 2022.

c. That in view of order (a) above, the suit, Mombasa CMELC – Rita Nappo v Rafiki Limited & 2 Others, pending before the Mombasa Chief Magistrates court, is hereby, transferred to Malindi Chief Magistrates Courts for hearing and determination.

d. The costs in both appeals, ELCA NOS. 50 & 53 of 2022, to abide the outcome of the suit, Mombasa CMELC – Rita Nappo v Rafiki Limited & 2 Others, pending before the lower court.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 11TH DAY OF JUNE 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Appellants: Mr. Kinyua

Respondent: Mr. Kimakia

Shitemi-court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.