



**Step Joint Limited v Kuria (Environment and Land Appeal 62 of 2019)
[2022] KEELC 14854 (KLR) (8 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 62 OF 2019**

BM EBOSO, J

NOVEMBER 8, 2022

BETWEEN

STEP JOINT LIMITED APPELLANT

AND

DANIEL GITAU KURIA RESPONDENT

(Being an Appeal against the Ruling of Hon C. A Omondi-Otieno (SPM) delivered in the Senior Principal Magistrate Court at Ruiru on 24/9/2019 in MCLE No. 11 of 2019)

JUDGMENT

Background

1. This appeal arose from the ruling rendered on 24/9/2019 by Hon C A Otieno – Omondi, Senior Principal Magistrate, in Ruiru SPMC MCLE Case No 11 of 2019 [Originating Summons]. The determination should have been rendered as a judgment because it was a final determination of the dispute after trial. Parties elected to conduct trial in the subordinate court through affidavit evidence and written submissions. Before I delve into the issues that fall for determination in this appeal, I will outline a brief background to the appeal.
2. On 8/4/2019, the appellant, Step Joint Limited, took out, in the Senior Principal Magistrate Court, an originating summons dated 3/4/2019, seeking: (i) an order directing that it be registered as proprietor of 0.424 hectare portion of land parcel number Ruiru East Block 1/5318; (ii) an order directing the respondent to hand to the appellant completion and conveyance documents relating to the above title; (iii) an order directing the respondent to sign all relevant completion and conveyance documents relating to the above title; (iv) in the event of default on part of the respondent, an order authorizing the “Deputy Registrar of the Kiambu High Court” to execute completion and conveyance documents; (v) an order directing the “Registrar of Titles” to transfer 0.424 hectare portion of Ruiru East Block 1/5318 to the appellant; and (vi) a permanent injunction restraining the appellant against trespassing



on, alienating, or interfering with the appellant's use of the 0.424 hectare portion of Ruiru East Block 1/5318.

3. The appellant's case was that, through a sale agreement dated 27/6/2016, the respondent sold to them land parcel number Ruiru East Block 1/5318, measuring 0.424 of a hectare, at an agreed purchase price of Kshs 3,000,000. They paid to the respondent the above purchase price in full and they took possession of the land. They cleared the bushes on the land and fenced it. Upon the respondent being furnished with transfer documents to execute, he declined to execute the documents, despite having received purchase price in full and despite having given the appellant vacant possession of the land. That is what triggered the suit in the trial court.
4. The respondent filed a response to the originating summons in which he deposed that at the time of entering into the material agreement, the appellant was aware that he [the respondent] did not have the original title relating to Ruiru East Block 1/5318 because the title had been charged to Housing Finance Company of Kenya [HFCK]. He added that, besides the appellant carrying out a search on the title, which confirmed that the title was charged, he wrote to the appellant on 20/8/2018, reminding the appellant that the charge in favour of HFCK still subsisted and would be due for discharge by March 2020. The respondent added that it was not possible to obtain the consent of the Land Control Board due to the subsisting charge. He contended that he had offered to refund to the appellant the purchase price. He contested the jurisdiction of the Magistrate Court, contending that the originating summons should have been taken out in the High Court at Kiambu.
5. Upon hearing the originating summons, the trial court rendered the impugned ruling. The trial court held that since there existed on the title register, a charge in favour of HFCK, the reliefs sought by the appellant were not available. The trial court found that the appropriate relief available to the appellant was an order for refund of the purchase price [Kshs 3,000,000] together with interest at court rate from the date of "Judgment" till payment in full.

Appeal

6. Aggrieved by the finding and award of the trial court, the appellant brought this appeal, advancing the following verbatim grounds of appeal:
 1. That the learned trial magistrate erred in law and fact by totally disregarding and overlooking the fact that the appellant had entered into an earlier sale agreement dated January 29, 2014 that superseded the charge registered on August 12, 2015.
 2. That the learned trial magistrate erred in law and fact by completely divesting the appellant of the title to its own property.
 3. That the learned trial magistrate erred in law and fact by failing to appreciate that the respondent voluntarily entered into the second sale agreement with the appellant in order to undo the wrong he had committed against the appellant by selling parcel No. Ruiru East Block 1/5321 to a third party without the appellant's knowledge or approval.
 4. That the learned trial magistrate erred in law and in fact in disregarding the contents of the acknowledgment receipt and agreement between the appellant and the respondent dated 30/6/2016.
 5. That the learned trial magistrate erred in law and fact by failing to fully appreciate that the respondent was ready and willing to bring the sale transaction to completion by substituting the security held at Housing Finance Company of Kenya with another parcel of land or by the servicing and settling of the loan account by march 2020.



6. That the learned trial magistrate erred in law and fact by failing to fully appreciate that the respondent had acted in bad faith and failed to perform his obligations under the sale agreement by selling the subject matter with encumbrances contrary to the sale agreement entered between parties.
 7. That the learned trial magistrate erred and misdirected herself by misunderstanding the intricate nature of the suit before her being a land matter and taking a resolute position that the respondent should only refund the appellant the purchase price of Kshs 3,000,000 yet the price of land has been escalating annually.
 8. That the learned trial magistrate erred and misdirected herself by failing to take into consideration that since 2014, when the appellant paid a deposit to the respondent, the price of the suit property has risen drastically.
 9. That the learned trial magistrate erred and misdirected herself in law and in fact by failing to appreciate that in Kenya, documents pertaining to land are forged on a daily basis and any document produced in court needs to be investigated further. The trial magistrate failed to appreciate that an analysis of the green card needed to be conducted to ascertain its authenticity relating to the suit property. Despite the authenticity of the green card produced by the respondent being unknown, the trial magistrate gave adverse orders that had a detrimental effect on the appellant's interest in the suit property.
 10. That the learned trial magistrate erred and misdirected herself in law and fact by failing to find that the oral evidence/testimony of the appellant, respondent and the land registrar were relevant before giving final order.
 11. That the learned trial magistrate erred and misdirected herself by failing to appreciate that due to the complex and serious issues raised by the respondent, a full hearing founded on a plaint was required.
 12. That the learned trial magistrate erred and misdirected herself by failing to appreciate that by virtue of Order 37 rule 19 of the Civil Procedure Rules, the honorable court has the power to order proceedings commenced by way of an originating summons to continue as if the cause had been so begun by filing a plaint and may, in particular, order that any affidavits filed to stand as pleadings.
 13. That the learned trial magistrate erred in law and fact by proceeding to award the refund of the purchase price of Kshs 3,000,000.
 14. That in all the circumstances of the case, the findings of the learned magistrate are insupportable in law and fact.
7. The appellant prayed that the appeal be allowed and the order of the subordinate court be substituted with the following orders:
- a. That the subordinate court's ruling and all the consequential orders therein delivered on September 24, 2019 be set aside and/or vacated and the same be substituted with an order that the appellant be registered as the proprietor of all that 0.424 hectares portion of Title No Ruiru East Block 1/5318.
 - b. That the subordinate court's ruling and all the consequential orders therein delivered on September 24, 2019 be set aside and/or vacated and the same be substituted with an order that



the suit be revived and the proceedings, commenced by way of an originating summons, to continue as if the cause had been so begun by filing a plaint.

- c. That the appellant be at liberty to agitate its claim through an ordinary civil suit.
- d. That this appeal be allowed as prayed with costs of the instant appeal and costs in the lower court proceedings be borne by the respondent.
- e. That in the alternative and without prejudice to the foregoing, the respondent be ordered to pay general and aggravated damages for fraud, unjust enrichment, deceit and breach of contract.
- f. That this honourable court do grant any other order it may deem fit to grant.

Submissions

8. The appeal was canvassed through written submissions dated 31/1/2022 and supplementary written submissions dated 4/7/2022, both filed by M/s Kyalo & Associates. Counsel for the appellant contended in their initial submissions that the two questions that fell for determination in the appeal were: (i) the question as to whether the appeal dated October 23, 2019 should be allowed; and (ii) the question relating to costs of the appeal.
9. Counsel for the appellant opened their arguments by urging this court to “save the suit by converting the originating summons into a plaint and order that the affidavits filed be considered as pleadings pursuant to the provisions of Order 37 rule 19 (1) of the *Civil Procedure Rules 2010*”. Counsel cited Order 37(3) of the *Civil Procedure Rules* and submitted that the originating summons should have been taken out in the relevant third tier superior court because the magistrate court was not the court contemplated under Order 37 rule 3 of the *Civil Procedure Rules*. Counsel argued that the magistrate court lacked jurisdiction to entertain the originating summons.
10. Counsel argued that at the time of taking out the originating summons, the appellant genuinely believed that the two issues for determination was the execution of the transfer instrument and application for the consent of the Land Control Board. It was the position of counsel that the scenario changed when the respondent filed a response to the originating summons, raising serious allegations that the suit property was charged to HFCK. Counsel argued that for the two parties to prove their respective cases, there was need for detailed discovery, issuance of interrogatories, and cross examination of witnesses to establish the truth. It was the position of counsel that because of the complex and serious issues raised by the parties, a full hearing founded on a plaint was required.
11. On damages, counsel for the appellant submitted that the principle applicable to damages in a contractual relationship is that damages are intended to compensate the party who is not in breach by putting him in the position he would have been in had the breach not occurred. Counsel urged this court to award the appellant damages that would put it in the same position in which it would have been in if the breach had not occurred.
12. In the supplementary written submissions dated 4/7/2022, counsel for the appellant identified the following as the “further questions” that fell for determination in this appeal: (i) Whether the trial court erred by relying on a green card that was unverified and uncertified; and (ii) Whether the trial court erred by directing the respondent to pay Kshs 3,000,000 while fully aware that the value of land in Kenya increases annually and the respondent was ready and willing to bring the sale transaction to an end.



13. Counsel submitted that an analysis of the green card needed to be conducted by the trial court in order to ascertain its authenticity prior to any adverse orders being issued. Counsel contended that the green card was not certified hence it was inadmissible. On the award of Kshs 3,000,000, counsel submitted that it was wrong for the trial court to award the appellant only Kshs 3,000,000 and allow the respondent to walk away with the suit property whose value was much higher than the sum of Kshs 3,000,000.
14. The respondent filed written submissions dated 19/5/2022, through M/s Waithera Mwangi & Co Advocates. Counsel for the respondent identified the following as the issues that fell for determination in the appeal:
 - a. Whether the appeal is meritorious:
 - i. Whether the appellant invoked the correct process by instituting the action by way of an originating summons.
 - ii. Whether failure to file submissions was fatal to the appellant's suit.
 - (b) Who is to bear the costs of this appeal.
15. On whether the appeal is meritorious, counsel submitted that, as a purchaser, the appellant had the obligation of conducting a search to ascertain that the title they were purchasing was free from any encumbrances. Counsel argued that there was evidence that title number Ruiru East Block 1/5318 had been charged to HFCK on 12/8/2015. Counsel contended that the charge in favour of HFCK was an overriding interest on the land and therefore the land could not be registered in the name of the appellant while the charge subsisted.
16. On the appellant's contention that the respondent declined to execute the transfer instrument, counsel submitted that the transfer instrument exhibited by the appellant related to Ruiru East Block 1/5218 and did not relate to Ruiru East Block 1/5318. Counsel added that the respondent could not sign the said transfer instrument because he was a stranger to it and that they had not obtained the requisite land control board consent relating to it. Counsel reiterated that the prayers in the originating summons were not available because the land was charged to HFCK.
17. On whether the appellant invoked the correct process by instituting the action by way of an originating summons, counsel for the respondent submitted that the manner of initiating a suit through an originating summons was provided under Order 37 of the *Civil Procedure Rules* and that an originating summons is used to initiate suits relating to simple questions of law, where there are no disputed facts. Counsel argued that an originating summons deals with matters that are not contentious and complex. It was the position of counsel that the issues raised in the originating summons were complex and raised serious questions hence an originating summons was not the appropriate instrument to use. Counsel added that the appellants had admitted in their written submissions that the subordinate court did not have jurisdiction to entertain a suit under Order 37 of the *Civil Procedure Rules*.
18. On the appellant's plea to the court to direct that the originating summons be treated as a plaint, counsel submitted that the plea was never made to the subordinate court and therefore cannot be properly made to this court.
19. On whether failure by the appellant to file submissions in the trial court was fatal to the appellant's suit, counsel submitted that the trial court having directed parties to dispose the originating summons through written submissions and the appellant having failed to file written submissions, the trial court had no basis for granting the appellant the award of Kshs 3,000,000. Counsel contended that the trial court should have dismissed the appellant's suit. Counsel urged the court to dismiss the appeal.



Analysis and Determination

20. I have perused the original record of the trial court and the grounds of appeal in this appeal. I have also considered the parties' rival submissions. In their initial written submissions, the appellant framed one substantive issue for determination in this appeal: the question as to whether the appeal dated 23/10/2019 should be allowed. In their supplementary written submissions, they framed the following two issues: (i) Whether the trial court erred by relying on a green card that was unverified and uncertified; and (ii) Whether the trial court erred by directing the respondent to pay Kshs 3,000,000 while fully being aware that the value of land in Kenya increases annually and the respondent was ready and willing to bring the sale transaction to an end.
21. On his part, the respondent framed two issues; (i) Whether the appellant invoked the correct process by instituting the action by way of an originating summons; and (ii) Whether failure to file submissions was fatal to the appellant's suit.
22. At this point, it is to be noted that there is no cross-appeal before this court. Secondly, the issues to be determined by this court, at this appellate stage, should flow from the grounds of appeal as read together with the submissions tendered in support of and against the grounds of appeal. Thirdly, the issues to be determined by this court should be those issues that were raised or canvassed in the trial court. The appellant was given an opportunity to file written submissions in the trial court but elected not to canvass the originating summons through written submissions.
23. With the foregoing in mind, the following are in my view, the three issues that fall for determination in this appeal: (i) Whether the trial court erred in accepting the originating summons taken out in a subordinate court and if so, what is the fate of the proceedings and the determination of the subordinate court?; (ii) Whether the trial court erred in accepting an extract of the land register annexed to the respondent's replying affidavit as conclusive evidence and proof of existence of a charge against the suit property; and (iii) What disposal orders are appropriate in the circumstances. I will make brief sequential pronouncements on the three issues in the above order.
24. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [*Susan Munyi v Kesbar Shiani*](#) (2013)eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
25. The above principle was similarly outlined in [*Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates*](#) [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”



26. The first issue is whether the trial court erred in accepting the originating summons taken out in a subordinate court and if so what is the fate of the proceedings and the determination of the subordinate court. The title and designation of the suit giving rise to this appeal reads as follows:

“ Republic of Kenya
In the Chief Magistrates Court of Kenya
In the Environment and Land Court at Kiambu
Environment & Land Case No 11 of 2019
Step Joint Limited Plaintiff
-vs-
Daniel Gitau Kuria Defendant”

27. A reading of the above designation clearly reveals that the appellant was not clear about the court where the originating summons was intended to be taken out. The originating summons was expressed as taken out in the Chief Magistrate Court and the same time it was expressed as taken out in the “Environment and Land Court at Kiambu”.
28. Secondly, the originating summons was expressed as having been taken out under Article 159 of the *Constitution*, Sections 1A and 1B of the *Civil Procedure Act*, and Section 3 of the *Environment and Land Court Act*. My perusal of the above frameworks does not disclose a conferment of jurisdiction on the subordinate court to accept and adjudicate an originating summons raising the questions that were raised in the originating summons giving rise to the impugned ruling. The respondent challenged the jurisdiction of the subordinate court to adjudicate the originating summons in paragraphs 13, 14 and 15 of his replying affidavit. On their part, the appellant have expressly conceded in their submissions before this court that the magistrate court had no jurisdiction to accept and adjudicate the originating summons.
29. Our superior courts have umpteen times emphasized that jurisdiction is confirmed either by the *constitution* or through legislation. The Supreme Court of Kenya emphasized this point in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR in the following words:
- “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.”
30. The questions which the appellant invited the subordinate court to answer on the platform of an originating summons were questions whose adjudication was specifically provided for under Order 37 rule 3 of the *Civil Procedure Rules*. The questions raised in the originating summons were questions that were to be raised in an originating summons taken out in a superior court and drawn returnable to a judge.
31. For clarity, Order 37 rule 3 of the *Civil Procedure Rules* provides as follows:
- “A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out



of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).”

32. For the above reasons, it is my finding that the trial court had no jurisdiction to entertain the originating summons and therefore the trial court erred in accepting the originating summons. Without jurisdiction, the proceedings in the magistrate court and the impugned ruling were all nullities.
33. On whether the trial court erred in accepting the extract of the land register annexed to the respondent’s replying affidavit as conclusive evidence and proof of existence of a charge against the suit property in favour of HFCK, I have looked at the originating summons and the replying affidavit. Further, I have reflected on the appellant’s contention that the exhibit was inadmissible.
34. First, parties agreed to have trial conducted through affidavit evidence and written submissions. The issue of inadmissibility of the extract of the land register exhibited by the respondent never arose during trial in the subordinate court. The issue cannot therefore be properly raised in this appeal.
35. Secondly, having looked at the extract of the land register [green card] which the respondent exhibited as “DGK 1”, it is clear that the register relates to parcel number Ruiru East Block 1/5218. The land subject matter of the originating summons was Ruiru East Block 1/5318. These are clearly two distinct parcels of land. It is surprising that the trial magistrate and all the counsel involved in the originating summons did not notice the above disparity. It is therefore clear that even if the trial court had jurisdiction to entertain the originating summons, the extract of the land register exhibited by the respondent related to parcel number Ruiru East Block 1/5218 and was therefore not conclusive evidence or proof of existence of a charge against parcel number Ruiru East Block 1/5318. That is my finding on the second issue.
36. It is clear from the foregoing that the subordinate court had no jurisdiction to entertain the originating summons. Secondly, it is clear that the trial court relied on an irrelevant parcel register to reach its findings. Thirdly, it is clear that the questions that were raised in the originating summons have not been answered and may need to be answered on a proper platform. In the circumstances, the appropriate disposal order would be to set aside the impugned ruling and substitute it with an order striking out the originating summons. Unlike a dismissal order, an order striking out the originating summons will leave the parties concerned with the liberty to pursue an adjudication of the dispute by an appropriate court on an appropriate platform.
37. Given that it was the duty of the trial magistrate to ascertain that she had jurisdiction to entertain the originating summons and that the land register placed before her related to the suit property there will be no award of costs in this appeal. Similarly, there will be no award of costs in the suit in the trial court.
38. In the end, this appeal succeeds and is disposed in the following terms:
 - a. The ruling rendered on 24/9/2019 in Ruiru SPMC MCLE Case No 11 of 2019 is set aside and is substituted with an order striking out the originating summons with no order as to costs due to want of jurisdiction on part of the Senior Principal Magistrate Court and due to the court’s reliance on a land register that was at variance with what was pleaded.
 - b. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 8TH DAY OF NOVEMBER 2022

B M EBOSO



JUDGE

In the Presence of: -

Mrs Kamau for the Appellant

Court Assistant: Ms Osodo

