



REPUBLIC OF KENYA



KENYA LAW
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**Muhuyi v Mulinya (Civil Appeal E085 of 2023)
[2025] KEHC 2310 (KLR) (5 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E085 OF 2023**

**AC BETT, J
MARCH 5, 2025**

BETWEEN

ZEBBY MUMELO MUHUYI APPELLANT

AND

BENSON MANUNI MULINYA RESPONDENT

*(Being an appeal arising from the Judgement of Hon. Caroline Cheruiyot (RM/Adjudicator)
in Kakamega SCCOM. No. E066 of 2023 delivered on the 16th day of May 2024)*

JUDGMENT

Background

1. The Respondent lodged claim in the Small Claims Court in which he prayed for compensation for loss of damage to property to wit trees valued at Kshs. 317,870/=.
2. In response to the statement of claim, the Appellant denied the whole claim and averred that he was the beneficial owner of the land upon which the trees were growing since it was still registered in the name of Respah Ngaira Waiganagana (deceased). The Appellant averred that he did not have an agreement with the Respondent concerning the land.
3. The Appellant also gave notice that he intended to raise a preliminary objection to the entire suit on the ground that it was res judicata as the same issues had been litigated and determined in Kakamega HC. Succession Case No. 18 of 2006 and Kisumu Civil Appeal No. 53 of 2015.
4. The matter proceeded to hearing and in a judgment dated 16th May 2023, the learned Adjudicator entered judgement on 100% liability in favour of the Respondent as against the Appellant for loss or damage of the trees and ordered the Appellant to pay the Appellant the sum of Kshs. 317,870/= plus costs and interest for the loss.



5. Being aggrieved by the decision of the learned Adjudicator, the Appellant lodged a Memorandum of Appeal in which it set down the grounds of appeal as follows:-
 1. That trial Adjudicator grossly erred in holding that she had jurisdiction to entertain the claim.
 2. That trial Adjudicator grossly erred in evaluation of the evidence before her.
 3. That the learned trial Magistrate grossly erred in not making a finding that the issues at hand are subject to Kakamega HCC. Succ. Cause No. 18/2005 and Kisumu Court of Appeal No. 53/2015 which decisions were ignored by the trial Adjudicator.
 4. That the learned trial Adjudicator did not place any weight on the submissions made on behalf of the Appellant mainly the fact that the title obtained fraudulently by the Respondent had been cancelled and whether allowing this claim was to enforce an illegality.
 5. That the learned trial Magistrate failed to apply the principle of Cujus est Solum et usque ad coelum et ad inferos (“whoever owns the soil, it is theirs all the way up to heaven and down to hell”).
 6. That the learned trial Magistrate grossly erred in relying on contradictory, incredulous, wish, washy evidence led by the Respondent and his witnesses.
 7. That the learned trial Magistrate grossly erred in admitting the forester report as it was without interrogation in light of the forests (Fees and Charges) Regulations, 2016 Schedule 11 thereof.
6. The court issued directions that the appeal be canvassed by written submissions.

Appellant’s Submissions

7. The Appellant submits that the learned Adjudicator failed to take into account the fact that she lacked jurisdiction to hear and determine the suit before her as the issues raised were similar to the issues raised in Kakamega HC. Succession Cause No. 18 of 2005 and Kisumu Civil Appeal No. 53 of 2015 which had already been dealt with in finality.
8. The Appellant further submitted that the learned Adjudicator failed to appreciate that the title being relied upon by the Respondent was obtained fraudulently and had been cancelled and therefore allowing the claim amounted to an illegality.
9. Further, the Appellant contended that the Adjudicator misapplied the principle of “Cujus est Solum et usque ad coelum et ad inferos”.
10. The Appellant further stated that there is nothing in Section 12 of the Small claims Act that would allow the learned Adjudicator to exercise her discretion in determining the matter that remains the sole preserve of the Environment and Land Court by dint of Article 162 (2) (b) of *the Constitution*.

Analysis and Determination

11. The Respondent submits that the trial court had jurisdiction to hear and determine the claim by virtue of the nature of the cause of action and or the subject matter before the trial court. The Respondent submits that the subject matter in the Small Claims Court was based on trees that had been harvested by the Appellant and not the issue of title to land.
12. The Respondent further submits that the very nature of the Respondent’s cause of action before the trial court had more to do with the value of the harvested trees and not the title to the land on which the trees were on and in any event, the trees had long been harvested.



13. According to the Respondent, the claim was a special damage claim which the Appellant never controverted by way of evidence. The Respondent relied on the case of *Simon Kiama Ndiangui v. Republic* [2017] eKLR in which the court rendered itself as follows:-

“In order to convict the court must be satisfied that, first, some property was destroyed; second, that a person destroyed the property; third, that the destruction was wilful and therefore there must be proof of intent; and fourth, the court must also be satisfied that the destruction was unlawful.

I cannot find any suggestion in this provision that ownership of the destroyed property must be established for liability to attach. My take on this issue is that ownership of the property is a relevant but not the defining factor; it may be taken into account amongst other evidence that tends to establish that the offence was committed.”

In the same breath, the Respondent submits that all that was required of him was to prove that the trees belonged to him and the exact value that he lost as a result of the Appellant’s wilful destruction thereof.

14. The Respondent further submits that the trial court considered relevant matters in reaching its judgement as it took note of the Respondent’s uncontroverted evidence. The Respondent relied on the case of *Netah Njoki Kamati & Another v Eliud Mburu Mwaniki* [2021]eKLR.

Analysis and Determination

15. This being a first appeal, the duty of the court is as set out in *Abok James Odera t/a A. J. Odera & Associates v Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where the court stated:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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.”

16. Applying the above principles to the instant appeal, I must first determine whether the learned Adjudicator had the requisite jurisdiction to hear and determine the claim.

17. The issue of jurisdiction was raised by the Appellant in the course of the hearing when the Respondent, during cross-examination conceded that the land upon which the trees were planted was sold to him by somebody who did not have the authority to do so. The Respondent’s title was subsequently cancelled in the year 2015 and the title reverted to the estate of the Appellant’s deceased mother.

18. In her ruling dated 5th May 2023, the Adjudicator held that she was seized with the requisite jurisdiction to hear and determine the claim because it was a claim for compensation for damage to property to wit, trees that had been felled by the Appellant.

19. After affirming her jurisdiction, the Adjudicator proceeded to hear the cause and make a determination allowing the Respondent’s claim.



20. It is trite law that jurisdiction is the paramount factor in the hearing of cases. Without jurisdiction, any decision made by the court is a nullity. This was underscored in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (K) Ltd [1989] KLR 1 where the court held:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

21. In the circumstances, I need to determine whether the court had jurisdiction before delving into the other issues raised in the appeal.
22. The Respondent’s claim rests on “destruction” of trees that were harvested from land which was determined by court to rightfully belong to the Appellant’s deceased father. The question this court has to resolve is whether ownership of land and ownership of trees planted thereon are two distinct issues.
23. The legal maxim “quicquid plantatur solo, solo cedit” defines the principle that anything growing from the land, belongs to the land. In light of the aforesaid legal maxim, it follows that any crop growing on a specific parcel of land is presumed to legally belong to the owner of the land. Additionally, the common law doctrine of “Cujus est Solum et usque ad coelum et ad inferos” which literally means “whoever owns [the] soil, [it] is theirs all the way [up] to heaven and [down] to hell applies to land ownership in our legal regime.
24. The principle of ownership of whatever is affixed to the land was expounded by the Court of Appeal in the case of Waribu Chongo v. Benson Maina Gathithi [2014] KECA 769 (KLR) when it stated thus:-

“The dispute in this appeal relates to ownership of trees on land. It is trite law that whatever is permanently attached to the soil becomes part of the soil and runs with the land; it matters not who affixed or embedded the object. This is captured in the latin maxim quicquid plantatur solo, solo cedit. The owner of the land becomes the owner of the soil and all objects permanently affixed or embedded thereto. In a conveyance or sale transaction, all objects affixed and embedded to the land at the time of the contract of sale must be left for the purchaser unless otherwise agreed. In law, a sale agreement is effective to pass objects permanently affixed to the soil without express mention (see Dibble Ltd v Moore, [1970] 2 QB 180).”

25. Flowing from the above reasoning, the Respondent’s claim could not be isolated from the Appellant’s defence that the land upon which the trees were planted rightfully belonged to the Appellant in his capacity as a beneficiary of the estate of his deceased mother at the time he felled the trees.



26. It is clear from the proceedings that the Respondent attempted to delink his claim from the jurisdiction of the Environment and Land Court by seeking to bring it within the purview of Section 13 (5) of the *Small Claims Court Act* which provides:-

“ 13.

(5) A claim shall not be brought before the Court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations.”

27. From the pleadings and submissions, the Respondent brought his claim under Section 12 (1) (c) of the *Small Claims Court Act*. Section 12 of the Act states:-

“(1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—

- (a) a contract for sale and supply of goods or services;
- (b) a contract relating to money held and received;
- (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
- (d) compensation for personal injuries; and
- (e) set-off and counterclaim under any contract.”

28. Upon reviewing the evidence, I find that there was more to the Respondent’s claim than a mere claim for compensation for damage to property. The documents he produced in an effort to prove ownership of the trees were documents relating to land. His right to the land was disputed.

29. It is not in dispute that the Respondent purchased the land upon which the trees were planted from the Appellant’s deceased brother. The Respondent averred that at the time he planted the trees, he had title to the land. For the court to determine whether the trees rightfully belong to him, it must first determine whether the land was rightfully his.

30. It is my considered opinion that the only courts that had the jurisdiction to determine to whom the subject trees rightfully belonged was the Environment and Land Court and the Probate and Administration Court as the land from which the trees were harvested was said to belong to Respah Ngaira Wangangana (deceased) in respect of whose estate Kakamega High Court Succession Cause No. 18 of 2005 is pending.

31. The determination as to the ownership of the land upon which the trees were planted was made to finality by the Court of Appeal in Kusumu Civil Appeal No. 53 of 2015 when the Court held that the Respondent had not acquired a good title and upheld the High Court’s decision to cancel his title. It follows therefore, that the court would need to determine whether the trees that the Respondent had planted on the land during the time that he held title lawfully belong to him. The learned Adjudicator did not have jurisdiction to make such a determination.

32. In the circumstances, I find and hold that the learned Adjudicator erred in assuming jurisdiction over the matter by purporting to isolate the trees from the land. The two are co-joined like Siamese twins by



operation of the law and the issue of ownership of the trees could not be determined without making reference to the ownership of the land upon which the trees were growing.

33. The upshot is that the appeal has merit and is hereby allowed. The Judgement of the learned Adjudicator is therefore set aside and the Respondent's claim struck out.

34. Due to the circumstances of the case, each party shall bear his own costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 5TH DAY OF MARCH 2025.

A. C. BETT

JUDGE

In the presence of:

Mr. Mondia for Appellant

Mr. Mulama for Respondent

Appellant present

Court Assistant: Polycap

