



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC APPEAL NO. 23 OF 2019**

**CECILIA WAMAITHA MWANGI.....APPELLANT**

**VERSUS**

**ELIZABTHE WAMBUI KAMICHAR.....1<sup>ST</sup> RESPONDENT**

**NELSON THIONGO MUKUNA.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Ruling and Orders of the Chief Magistrate Court*

*at Thika J.M Nangea (Chief Magistrate) dated 26<sup>th</sup> February 2019*

*in Notice of Motion Application dated 15<sup>th</sup> January, 2019,*

*in MCL&E No. 13 of 2019)*

**JUDGEMENT**

The 1<sup>st</sup> & 2<sup>nd</sup> Respondents instituted **Thika MCL& E No. 13 of 2019**, as against the Appellant **Cecilia Wamaitha Mwangi**, who was the 4<sup>th</sup> Defendant in the said suit. Concurrently the 1<sup>st</sup> & 2<sup>nd</sup> Respondents filed a Notice of Motion Application dated **15<sup>th</sup> January 2019**, and sought for orders that ;

*a) Pending the hearing and determination of the main suit herein, the 4<sup>th</sup> Defendant Cecilia Wamaitha Mwangi by herself, her agents and servants and all those persons claiming under her be restrained by injunction from disposing, selling, alienating, transferring, charging , pledging, leasing, wasting or in any howsoever from interfering with land plot Thika Municipality Block 9/430.*

*b) Costs of this Application be provided for.*

The Application was premised on the grounds that the Plaintiffs ( 1<sup>st</sup> & 2<sup>nd</sup> Respondents) got registered as owners of the suit properties on **11<sup>th</sup> November 2011**, and were duly issued with Certificate of Lease for **99 years**, with effect from **1<sup>st</sup> January 1991**. That the 4<sup>th</sup> Defendant had always known of the position as can be gathered from the fact that Vide **High Court Misc ELC No. 58 of 2017**, she made an Application to be made an Interested Party to oppose removal of a restriction over the same suit property. Further that on **30<sup>th</sup> July 2018**, the 4<sup>th</sup> Defendant got herself registered to the said property illegally and caused herself to be issued with Certificate of Lease. That she has occasioned double issuance of Certificate of Lease over the said same property, and there is a danger she can use it to defraud other parties .

In her Supporting Affidavit, **Elizabeth Wambui Kamichar** averred that she has the authority of the 2<sup>nd</sup> Plaintiff/ Applicant to swear the Affidavit and that their claims do not conflict as they are both co-registered owners of **Plot No. Thika Municipality Block 9/430**, and annexed the copy of the Certificate of Lease.

The Application was opposed by **Cecilia Wamaitha Mwangi** who swore a Replying Affidavit on **1<sup>st</sup> February 2019**, and averred that she was allocated the suit property in the year **1988**, by the Commissioner of lands. That on **26<sup>th</sup> May 2011**, she received a Notification of approval of Development Permission for **L.R No. 4953 /1925**, which was later converted to Thika Municipality **Block 9/430**, and she paid

the sum of **Kshs.30,200/=**. Further, that on **21<sup>st</sup> April 2011**, she received a land rent demand note from the Ministry of Lands indicating that she owed the sum of **Kshs.2,400/=**. That she surrendered the original title issued under the **Registration of Titles Act** and expected to be issued with a new title under the **Registered Land Act** and after surrendering the original **RTA Title**, the parcel file for the subject parcel of land disappeared, only for the Applicants to appear with a Certificate of Lease, purported to have been issued by the Thika Lands Registry. That she followed up with various offices and on **12<sup>th</sup> June 2015**, **Mr. Mucheke Z.Y.**, wrote to the District Land Registrar at Thika, confirming that **L.R 4953/1925-IR 50997**, belonged to her and also confirming that she had surrendered the original title. Further, that on **12<sup>th</sup> June 2015**, the Chief Land Registrar wrote to the District Land Registrar, informing him that **L.R No. 4953/1925**, had been converted and requested him to issue a Certificate of Lease in her name. That she wrote to the **Ethics and Anti Corruption Commission (EACC)** and on **10<sup>th</sup> June 2017**, and **26<sup>th</sup> January 2018**, the Thika District Land Registrar wrote to the Chief Land Registrar informing him that investigations had established that **L.R 9/430**, had been fraudulently registered in the name of **Elizabeth Wambui Kamichar** and **Nelson Thiongo Mukuna**, to which she lodged investigations with the Police and the 1<sup>st</sup> Plaintiff/ Applicant has been charged in Court. That there is a pending proceeding to wit **Thika CMCC No. 884 of 2014 Cecilia Wamaitha Mwangi ...VS.. Elizabeth Wambui Kamicha**. That it is not possible for the Applicants to have been issued with a Certificate of Lease on **6<sup>th</sup> December 2011** since she was already a bonafide owner. That there is also an Application pending before the **Environment & Land Court at Thika**. That upon establishing that the Applicants had been issued with a Certificate of Lease irregularly, the same was cancelled and she was issued with a Certificate of lease. That the Applicants had failed to make material disclosure and that the value of the subject parcel of land is above **Kshs. 20,000,000/=** and any dispute should be handled by the Environment and Land Court, Thika.

The Plaintiffs/ Applicants ( Respondents ) filed a further Affidavit sworn by **Elizabeth Wambui Kamichar** on **6<sup>th</sup> February 2019**, and averred that there were two searches done that show the Plaintiffs/Applicants ( Respondents,) were issued with a Certificate of Lease on **19<sup>th</sup> March 2012**, and the 4<sup>th</sup> Defendant ( Appellant) was issued with a Certificate of Lease on **20<sup>th</sup> July 2018**, and there is no evidence that any of the Leases were cancelled. That the Court case No. **884 of 2014**, has never been brought to her attention and she was never served with any Court summons and that the conversion of the R.T.A title does not lead to double allocation of an already registered Certificate of Lease .

The Application was canvassed by way of written submissions and on **26<sup>th</sup> February 2019**, the Court delivered its Ruling and allowed the Plaintiffs ( Respondents ) Application and held that:-

**“19. The Court accordingly finds and holds that on the material before it that the Plaintiffs have not established a prima facie case with a probability of success.**

**20. On the matter of irreparable loss, the 4<sup>th</sup> Defendant is in occupation of the suit land and she could dispose it or otherwise interfere with the land as she holds title. The Plaintiffs therefore stands to suffer irreparable loss that may not be compensated by damages as there is no evidence of the 4<sup>th</sup> defendants financial capacity. The determination of this question then turns on this limb of Giella... Vs...Cassman Brown supra and it is unnecessary to consider where the balance of convenience tilts to.**

**21. The Upshot is that the Plaintiffs Application is merited and is allowed in terms of prayer (a). The costs of the Application shall be in the cause.”**

The 4<sup>th</sup> Defendant (Appellant) was dissatisfied with the above determination and vide a Memorandum of Appeal dated **1<sup>st</sup> March 2019**, lodged this Appeal and sought for prayers that

**a) This Appeal be allowed.**

**b) The decision by the Chief Magistrates Court allowing the 1<sup>st</sup> & 2<sup>nd</sup> Respondents Application dated 15<sup>th</sup> January 2019 be set aside and substituted with an order dismissing the said Application.**

**c) The Honorable Court does make a finding that the trial Court has no jurisdiction to preside over any dispute over the subject parcel of land.**

**d) The Appellant to have costs of this Appeal as well as costs at the trial Court .**

The Appeal is based on the ground that ;

**1. That the Learned trial Magistrate erred both in Law and in fact in adjudicating that the Notice of Motion Application dated 15<sup>th</sup> January 2019, by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents despite having no pecuniary jurisdiction over the subject parcel of land whose value is Kshs.35,000,000/=.**

**2. That the Learned trial Magistrate erred in both law and fact by proceeding to allow the 1<sup>st</sup> and 2<sup>nd</sup> Respondents Notice of Motion Application dated 15<sup>th</sup> January 2019, despite having found that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents had not proved a prima facie case.**

**3. That the learned trial Magistrate erred in both law and fact by allowing the subject Application despite the same having been supported by insufficient evidence.**

**4. That the Learned trial magistrate erred in both Law and in fact by failing to appreciate the import of Thika CMCCC No. 884 of 2014 Cecilia Wamaitha Mwangi ....Vs... Elizabeth Wambui Kamichar which deals with the same subject matter.**

5. That the learned trial magistrate erred in both law and fact by allowing the subject application to be heard without the 2<sup>nd</sup> to 5<sup>th</sup> Respondents having been served with the same.

6. That the Learned trial magistrate erred on both law and in fact by allowing the 1<sup>st</sup> & 2<sup>nd</sup> Respondents' Application whose effect amounts to an eviction and or a mandatory injunction against the Appellant.

The Appeal was opposed and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn on **24<sup>th</sup> May 2021**, by **Elizabeth Wambui Kamichar**, who averred that the Appeal lacks merit and the same is an abuse of the Court process. She further averred that she has been advised by her Advocates, which advice she believes to be true that the report contemplated in the lower Court was never filed and hence the issue of jurisdiction was never ascertained. That she is further informed by her Advocates, which information she believes to be true that the **sub County Valuer** wrote to the Chief Magistrates Thika Law Courts and alluded to the fact that the suit property had been inspected and a Valuation Report prepared, which valuation report was never filed at all and as such the issue of jurisdiction was never ascertained. That the issue of jurisdiction was never contested in the lower Court as a preliminary issue, and the Appellant raises the same as an afterthought.

Further that she was never served with Summons with regards to **Thika CMCC No. 884 of 2014**, a fact that led to the setting aside of the Interlocutory Judgment obtained by the Appellant and the same ought to have been raised as a Preliminary ground. That the fact that in the said suit the Appellant had pleaded that the Court was seized with jurisdiction, it is inconceivable that she alleges that the Court lacks jurisdiction. That no orders of a final nature were issued against the Appellant, and the Court was therefore urged to dismiss the Appeal.

On the **26<sup>th</sup> of April 2021**, the Court directed that the Appeal be canvassed by way of written submissions and in compliance with the said directives, the Appellant through the **Law Firm of Kamwaro & Associates Advocates**, filed her written submissions dated **25<sup>th</sup> May 2021**, and submitted that the trial Court ordered the Government Valuer to visit the suit property and the same was carried out and the value of the suit land was found to be Kshs. **35,000,000/=** and that the Report of the Government Valuer bears the same value as that prepared by Liaison Valuers Limited dated **6<sup>th</sup> August 2018**. That it is evident that the trial Court does not have jurisdiction to deal with the matter. It was further submitted that after making a finding that the 1<sup>st</sup> & 2<sup>nd</sup> Respondents had not established a prima facie case, then the Court should **not** have proceeded to allow the Application for injunction. The Appellant relied on the case of **Thika ELC Case No. 197 of 2018 Novapeku (PK) Construction & Engineering Co. Ltd & Others ...Vs... County Government of Kiambu**.

It was further submitted that the trial Court should not have closed its eyes to the existence of the earlier suit and purport to injunct the Appellant and the suit filed by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents ought to have been stayed for being subjudice. That the trial Court allowed the Application to be heard despite the 1<sup>st</sup> & 2<sup>nd</sup> Respondents failing to prove service to the 3<sup>rd</sup> to 5<sup>th</sup> Respondents. Further that an Application filed by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents seeking to remove a restriction was dismissed for non-attendance and the 1<sup>st</sup> Respondent was on **15<sup>th</sup> September 2020**, convicted with an offence of Obtaining Registration by False Pretenses. And on Appeal on conviction and sentence, the High Court reduced the imprisonment to the time already served but the conviction remained.

The 1<sup>st</sup> & 2<sup>nd</sup> Respondents filed their written submissions dated **28<sup>th</sup> June 2021**, through the **Law Firm of Wario, Minishi & Associate Advocates**, and submitted that the issue of jurisdiction was never contested by the Appellant at the lower Court as a Preliminary issue and neither did she move this Court to have the matter transferred. That raising the issue in the Appeal is an afterthought. That the learned magistrate having considered all the circumstances surrounding the case together with evidence on record was justified in issuing the orders. That the lower Court intended to preserve the subject property and this Court is bound by the doctrine of *stare decisis* as the Court of Appeal in the case of **Naftali Ruthi Kinyua** enunciated the importance of preservation of the suit property.

That the Appellant ought to be estopped from canvassing the issue of jurisdiction on Appeal and that the 3<sup>rd</sup> to 5<sup>th</sup> Respondents were served and there is sufficient evidence on the same.

As this is a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by **Section 78** of the **Civil Procedure Act**. See the case of **Selle ...Vs... Associated Motor Boat Co. [1968] EA 123** where the Court held that;

*“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. 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 this 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 based on the demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hameed Saif vs. Ali Mohamed Sholan**(1955), 22 E. A. C. A. 270).*

As the Court determines this Appeal, it will take into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case **Mbogo vs Shah (1968) EA at Page 93**, where the Court held that:-

*“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted on because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”*

Having now carefully read and considered the **Record of Appeal**, the **Grounds of Appeal**, the **written submissions**, by the parties and the

Ruling of the lower Court, the Court finds that the issues for determination are;

1. *Whether the trial Court had Jurisdiction to hear and determine the dispute.*
2. *Whether the Appeal is merited*
3. *Who should bear the costs of this Appeal*

**1. Whether the trial Court had Jurisdiction to hear and determine the dispute.**

It is the Appellant's contention that the trial Court had no jurisdiction to deal with the matter as the suit property was well beyond its pecuniary jurisdiction. Though, the Respondents have contended that the Appellant never raised the issue of jurisdiction, the Court has perused the Replying Affidavit sworn by the Appellant on **1<sup>st</sup> February 2019**, in opposition to the Application in which she indicated that the value of the subject land as above **Kshs.20,000,000/=** and ought to have been handled by the **Environment & Land Court**. Further, it is trite that jurisdiction is everything and without it, a Court has no option but to down its tools. That jurisdiction flows from either the Constitution and or statute and no Court can grant itself jurisdiction and neither can parties grant the Court jurisdiction, even by consent. As such Jurisdiction can be raised at any point even at the Appeal stage for the first time. See the case of **Kenya Ports Authority v Modern Holdings [E.A] Limited [2017] eKLR** where the Court held that:-

*“Generally speaking and on the authority of the Supreme Court decision in Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others, a Court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the Court cannot entertain any proceedings and must down its tools. See The Owners of the Motor Vessel Lilian ‘S’ v. Caltex Kenya Limited (1989) KLR 1.*

*This Court in Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;*

*“1.....*

*2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.*

*3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.*

*4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.*

*5. Where a cause is filed in Court without jurisdiction, there is no power on that Court to transfer it to a Court of competent jurisdiction.*

*6. ....*

*7. ....” (Our emphasis).*

*We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:*

*“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself*

*- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”*

It is not in doubt that the Appellant indeed did raise the issue of jurisdiction. It is further not in doubt that subsequently, the trial Court did order the Ministry of Lands and Physical Planning to conduct a valuation of the suit property. As per the Valuation Report dated **19<sup>th</sup> February 2020**, the Sub County Valuer valued the suit property at **Kshs. 35,000,000/=** the same being the valuation as per the Valuation Report of Liaison Valuers Limited dated **6<sup>th</sup> August 2018**. This suit was filed on **15<sup>th</sup> April 2019**. No valuation has been presented by the Respondents to Counter the above Valuation as presented. The above being the Valuation of the suit property and given that the suit was handled by **Hon. Nangea**, a Chief Magistrate who has a pecuniary jurisdiction of **Kshs.20,000,000/=**, it automatically follow that trial Magistrate did not have requisite **pecuniary jurisdiction**, to deal with the matter and subsequently the Orders granted to that effect are **null** and **void**.

**2. Whether the Appeal is merited**

The Court having held that the trail Court had **no pecuniary jurisdiction**, it follows that any orders granted are **null** and **void** ab initio and there would be no need to set them aside and thus the Appeal is merited.

Having held that the trial Court had no jurisdiction, this court finds that the Appeal herein **is merited**.

There was an issue raised in principle by the Appellant which the Court wishes to consider. The Court notes that the trial Court had held that the Respondents did not have a prima facie case, but went ahead to consider the other limbs. Without going to the merits of the same, it is important to note that the principles are sequential in nature, and if the Court is to find that a party has not established a prima facie case, even if it is to consider the other limbs, that would only be for completeness of records, as all the principles must be established. See the case of **Family Bank Limited ...Vs... Tassels Enterprises Limited & 2 others [2021] Eklr**, where the Court held that;

*10. More recently, the Court of Appeal in Nguruman Limited v Jane Bonde Nielsen and 2 Others NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR reiterated the settled principles in Giella v Cassman Brown (Supra) as follows:*

*In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;*

*(a) establish his case only at a prima facie level,*

*(b) demonstrate 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.*

*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 stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.*

*18. By insisting that the condition for the grant of injunction must be satisfied sequentially as distinct and logical hurdles, the Court of Appeal in Nguruman Case (Supra) meant that if a party fails to establish a prima facie case, then the Court need not consider the other grounds. But for completeness of the record, I shall consider the other conditions.*

### **3. Who should bear the Costs of this case**

**Section 27 of the Civil Procedure Act** gives the Court discretion to grant costs. However, it is trite that costs usually follow the event, unless special circumstances present themselves. In this instant, the Appellant is the successful party and therefore entitled to the Orders sought.

Having now carefully considered the instant Appeal and the available evidence at the trial Court, this Court finds and holds that the said trial Court **did not** have the **requisite pecuniary Jurisdiction** to deal with the instant matter. The Appeal herein is **found merited** and the said lower Court suit as filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is hereby **struck out** with costs to the Appellant. All consequential orders issued by the trial Court are set aside.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**Court Assistant – Kuiyaki**