



Musau v Mulandi Kisabiti & Associates & another (Civil Appeal 108 of 2019) [2024] KEHC 6851 (KLR) (7 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6851 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 108 OF 2019**

FR OLEL, J

JUNE 7, 2024

BETWEEN

ROBERT MUTYANGO MUSAU APPELLANT

AND

MULANDI KISABITI & ASSOCIATES 1ST RESPONDENT

UPSTATE KENYA AUCTIONEERS 2ND RESPONDENT

JUDGMENT

A. Introduction

1. This appeal arises from the ruling/order of HonC.A. Ocharo(SPM) dated 6th August 2019, where she upheld the preliminary objection filed by the respondents that the Appellant lacked legal capacity to individually protect his interest in the suit property to the exclusion of his co-administrators and therefore his claim must fail. She further held that the court indeed lacked jurisdiction to entertain the suit as filed and proceeded to strike out the entire suit

B. The Pleadings

2. The Appellant filed the primary suit as against the Respondents and averred that he was the legal representative of the Estate of the late Musau Mwanja alias Moses Musau Mwanja. That at all material times, he occupied and exclusively used property Known as LR Number Machakos Town Block 11/276 (hereinafter referred to as the suit property) and his occupancy thereof was obtained during the lifetime of the late Musau Mwanja alias Moses Musau Mwanja (His father) and therefore there had never been a landlord and Tenant relationship which ever existed.
3. Acting on a letter dated 7th March 2019 issued by the 1st Defendant, allegedly acting on behalf of the Estate of the late Musau Mwanja, the 2nd Defendant had wrongfully proclaimed and levied distress as against him, for unpaid rent, which action was unlawful, as he was one of the Administrators of the



estate of his late father and had never sanctioned such a move. He reiterated that his occupancy of the suit property was not on the basis of landlord/Tenant relationship nor was he a lodger to enable the respondents to so levy distress for rent. It was common knowledge that his late father had left a vast Estate, which properties were protected and taken care of by the beneficiaries pending conclusion of Machakos High court Succession Cause No 148 of 1997.

4. The Appellant therefore prayed the status quo before the purported distress of rent with regard to occupation and use of the suit property, which was obtained during his father's life time be maintained and the respondents be restrained by a permanent injunction from auctioning his properties and/or interfering with his ownership and occupation thereof.
5. In response to the suit and application for temporary injunction filed, the respondents filed Grounds of opposition and a notice of preliminary objection. They stated that this suit was bad in law, incompetent and the court lacked jurisdiction to hear and determine the said suit as the dispute raised related to a landlord and tenant relationship and it ought to have been filed at the Business Rent tribunal or in the succession matter that was pending before court. Further there was a misjoinder of parties as the Appellant ought to have sued his co administrators who had instructed the respondents to distress for rent and had not sought the consent of the other administrators to file this suit.
6. The same issues were raised in the Notice of preliminary objection, where it was stated that the suit as filed was a nonstarter and incompetent. The 1st respondent was wrongfully sued and the court lacked jurisdiction to entertain the suit. The respondents therefore prayed that the suit be dismissed.
7. The trial court did direct that the preliminary objection be disposed of by way of written submissions, proceeded to consider and uphold the same. Being wholly aggrieved and dissatisfied by the Ruling/order issued, the appellant did prefer this appeal and raised six (6) grounds of Appeal namely;
 - a. Notwithstanding the letter and text of the plaint and the prayers sought therein the learned senior principal Magistrate grossly misdirected herself in treating the plaintiffs suit as filed as a suit filed on behalf of the Estate of the late Musau Mwanja and thus arrived at the wrong conclusions.
 - b. The learned Senior Principal Magistrate erred in failing to appreciate and holding that the wrongs complained of were wrongs against the plaintiff personally and not in his capacity as administrator of the Estate of the late Musau Mwanja.
 - c. In the Absence of evidence that the defendants were acting on behalf of the Estate of Musau Mwanja and that they had instructions from all the administrators, the learned senior Principal Magistrate was wrong in failing to note and hold that the distress for rent which gave rise to the suit was not lawful.
 - d. The said Magistrate misdirected herself and erred in failing to appreciate that the property for which distress had been levied and which gave rise to the cause of action was solely the property of the Appellant.
 - e. The said Magistrate was wrong in denying the Appellant an opportunity to be heard on merit in opposing the Application for breaking orders, the orders for which amounted to execution in the absence of a substantive suit.
 - f. The decision of the learned senior Principal Magistrate was against the weight of the material presented to her.



8. The appellant prayed that this appeal be allowed, the finding of the trial magistrate order to strike out the suit be set aside and it be substituted with an order dismissing the preliminary objection and allowing the main suit to proceed for hearing. The Appellant also prayed for costs this appeal and for costs of proceedings before the trial Magistrate.

C.Submissions

(i).Appellant's Submissions

9. The appellant filed his submission dated 15th March 2023 and faulted the trial Magistrate for completely disregarding the fact that suit property belonged to the Appellant vis-a vis the estate of the late Musau Mwanja. There was uncontroverted evidence that there had never been a landlord tenant relationship as between the applicant and his late father and hence the respondents could not purport to levy distress for rent that was not due. Further he was one of the administrators to the estate of his late father and had not sanctioned any such move to levy for distress for rent.
10. The preliminary point of law raised did not raise pure points of law but rather delude on facts that needed to be addressed through oral evidence. The trial Magistrate ignored this fact and arrived at wrong findings not supported by the facts of the case. Further the trial magistrate was faulted for ignoring the fact that the Business and rent tribunal did not have jurisdiction to issue injunctive orders and therefore the appellant had rightly moved court to protect his interest. Reliance was placed on *Narshidas & Company Limited v Nyali Air Conditioning & Refrigeration services Cid* Appeal No 205 of 1995, *The Republic v Nairobi Business Premises Rent Tribunal & others, Ex parte Karasha*, [1979] KLR and also in the case of *Re: Hebtualla properties Limited* [1979] KLR 96.
11. The trial Magistrate was therefore wrong in holding that the court had no jurisdiction to hear and determine the matter before her and prayed that this appeal be allowed.
12. The respondent despite being served did not file any submissions in opposition to this Appeal.

D. Analysis and Determination

13. This court has examined the Record of Appeal, the grounds of appeal and given due consideration to the submissions filed by the Appellants counsel. This being a first appeal, this court has the duty to analyze and re-examine the evidence adduced in the lower court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated 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 reanalyze 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.”

14. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”



15. Similarly, in *Butt v Khan* (*supra*) it was held –

“An appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low”.

16. The subject of jurisdiction is by now well settled by the *Constitution*, the law and legal principles. Jurisdiction is defined in *Halsbury’s Laws of England* 4th Ed Vol 9 as

“...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” *Black’s Law Dictionary, 9th Edition*, defines jurisdiction as the court’s power to entertain, hear and determine a dispute before it.”

17. On the centrality of jurisdiction, the Court of Appeal in *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* [2013] eKLR stated that: -

So central and determinative is the issue of jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren *cui-de-sac*. Courts, like nature, must not sit in vain.”

18. Article 162(2) of the *Constitution* established a superior court to hear and determine disputes relating to the Environment and the use, occupation of, and title to land. The *Environment and land court Act*, No 19 of 2011 at Section 13(1) & (2) provides for the Jurisdiction of the said court and specifically provides that ;Section 13(1) of the *Environment and land court Act* states that;

1. This court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the *constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

Section 13(2) of the *Environment and land court Act* states that;

(2) In exercise of its jurisdiction under Article 162(2)(b) of the *constitution*, the court shall have power to hear and determine disputes.

a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rent, valuations, mining, mineral’s and other natural resources.

b. Relating to compulsory acquisition of land.

c. Relating to land administration and management.

d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and



e. Any other dispute relating to environment and land.

(3)

(4) In addition to the matters referred to in sub sections (1) and (2), the court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.

19. The dispute raised in the pleading herein relates to use and occupation of LR NO Machakos Town Block 11/276, which the appellant claimed he had exclusive possession based on authority of his late father one Musau Mwanja alias Moses Musau Mwanja. The respondents therefore could not act on instructions of other co administrator of the late Musau Mwanja's estate to proclaim on his goods as there was no tenant/landlord relationship that existed.

20. It is clear that the matters raised should be dealt with the Environment and land court, which was properly clothed with jurisdiction to determine the issues raised. In the case of *Joseph Muthee Kamau & Another v David Mwangi Gichure & Ano* [2013] the court succinctly settled this point in the following words;

“when a suit has been filed in a court without jurisdiction it is a nullity. Many cases have established that; the most famous being *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 courts 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. Also see *Phoenix of EA Assurance company limited v S.M Thiga T/A Newspaper services* [2019] eklr.

E. Disposition

21. This Appeal is therefore filed in the wrong court not properly clothed with jurisdiction to hear and determine the same and is hereby dismissed with no orders as to costs given that the dispute stems from succession/sibling rivalry, which should ideally be sorted out in the pending succession matter *Machakos High court Succession Cause No 148 of 1997*.

22. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 7TH DAY OF JUNE, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 7th day of June 2024.

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

