



**Waweru v Kinyenyeri (Civil Appeal 19 of 2013)  
[2024] KEHC 6739 (KLR) (5 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 6739 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL APPEAL 19 OF 2013  
HM NYAGA, J  
JUNE 5, 2024**

**BETWEEN**

**PETER KIGO WAWERU ..... APPELLANT**

**AND**

**MBOGO KINYENYERI ..... RESPONDENT**

*(Being an appeal from the Judgment of Hon. P. Mayova (Resident Magistrate)  
delivered on 10th January, 2013 in Nakuru CMCC No.1171 of 2011)*

**JUDGMENT**

**Facts of the case**

1. The Appellant had sued the Respondent in the lower court in the aforesaid suit vide a plaint dated 20<sup>th</sup> December, 2011 seeking for a permanent injunction restraining the Defendant/Respondent from entering, occupying, remaining on, trespassing on or in any way interfering with the entire parcel of land known as L.R Nakuru Municipality Block 29/648(Rhonda) and for costs of the suit.
2. His case was that he was the registered owner of the above parcel of land and on 15<sup>th</sup> November, 2011, the defendant/respondent herein poured(sic) building stones on the said land about 600 feet in readiness to erect a structure.
3. He averred that upon enquiry of the said action the defendant/respondent herein claimed that he had a claim on the same. He asserted that the acts of the defendant were bordering on encroachment and trespass and unless he is restrained he would suffer irreparable loss.
4. The Respondent through his defence dated 17<sup>th</sup> January, 2012 admitted to having deposited building materials on the suit land as alleged but stated that he purchased 1/8 of the suit property from the plaintiff/Appellant in 1993 and fully paid for the same.



5. It was his case that he took possession of the said portion in 1994 and put up a semi-permanent house in which he had lived with his family since then.
6. He also averred that at the time he purchased the said parcel of land there was already a house which belonged to the Appellant and which the latter had sold to him in the year 1997 at the costs of Kshs. 25,000/=
7. He further averred that the Appellant declined to receive a balance of Kshs. 7,610/= for the said house for no good reason and had declined to issue him with the title deed of the said portion.
8. In his counterclaim, the respondent asserted that he is entitled to a title deed for a portion of land measuring 0.0562 Hectares out of L.R No. Nakuru Municipality Block 29/648(Ronda) and he prayed for the Appellant to be ordered to cause a Title deed for 0.0562 Hectares to be issued in his name out of L.R No. Nakuru Municipality Block 29/648(Ronda) and in default the Executive Officer of this Honourable Court be allowed to execute all documents necessary to enable a Title Deed to be processed in the above terms. He also prayed for costs and interest of the suit at court rates till payment in full.
9. The Appellant/Plaintiff's case was heard on 24<sup>th</sup> May, 2012. The plaintiff/appellant testified that in 1993 he entered into a sale agreement with the respondent for a sale of 1/8 of an acre of the subject land at a consideration of Kshs.50, 000/=. He further said the Respondent paid him Kshs.23, 000/= and the balance was to be paid within 6 months but the Appellant failed to do so. He further stated that he entered into another sale agreement with the respondent for a sale of a house in the plot he had purchased at a cost of Kshs.25, 000/= but he did not pay. It was his testimony that it was their agreement that a party in breach of contract was to pay a penalty equivalent to 50% of the purchase price. He admitted that the defendant/respondent lived in the house on the land and that he had built an extra house there. He denied trying to solve this case at the Chief's office. It was his prayer that the orders sought do issue as the defendant/respondent failed to honor the terms of the agreement.
10. In cross examination, he said the balance of the sale of land of Kshs.27, 000/= was to be paid in 6 months and that the respondent did not pay the full amount. He stated that he was paid some money but he wasn't recording them anywhere. Regarding the money for sale of the house, he admitted that the respondent had paid Kshs.18, 000/= leaving a balance of Kshs.7000/=. He said the respondent lived in the house in 1993 and when he defaulted he left his son at the premises. He said that later, for his own reasons he subdivided the land into three portions i.e. A, B & C with the respondent occupying part B. He admitted that he had reported the issue herein at the chief's office and the chief tried to arbitrate it but he later withdrew the matter. He said he could not refund the money to the respondent as he could not find him.
11. In re-examination, he stated that had the respondent complied he would have given him the land.
12. The Respondent's case was heard on 12<sup>th</sup> July, 2012. The respondent testified that the Appellant sold him an 1/8 of the subject land at a consideration of Kshs.50, 000/= and he produced a copy of the agreement as D. Exhibit No.1. He said there was a house on the plot that the appellant sold to him at Kshs.25, 000/=. He produced the sale agreement of the house as D. Exhibit No.2. He stated that he paid part of Kshs.25, 000 and that the Appellant declined to receive the balance of Kshs.7600/=. He said the appellant used to sign against payment and the last payment he signed for was on 21<sup>st</sup> July, 2002. He said the appellant never transferred the land to him. He said the appellant's land was split into three and the occupant of the three portions paid Kshs.1000/= each for the subdivision. He said the transaction was handled by Rift Valley Enterprises and upon paying money to the company he was issued with a clearance certificate. He produced a copy of the Sketch Map and Clearance Certificate



as D. Exhibit No.3 and 4 respectively. He stated that the Appellant took title for the whole land fraudulently. He said he had lived on the plot from 1993 and he has been tilling and erected buildings thereon so it cannot be claimed that he was a trespasser.

13. In cross examination, he stated that he had fully paid for the house and the only money he owed the Appellant was Kshs.7600/= for the house which he had declined to receive. He said he deposited the building materials in 2011 and that was when the Appellant moved to court. He said he approached Kalenjin enterprises and they wrote a letter for him to get title from land registrar. He said the land was subdivided in the presence of all of them and the surveyor advised them to get consent from the land registrar first.
14. The trial court after considering the evidence of both parties dismissed the Appellant's case and allowed the Respondent's counterclaim as prayed.
15. The trial court did not find the evidence of the Appellant /plaintiff credible for reasons that the Appellant was dishonest since when he approached the court under certificate of urgency he deliberately failed to disclose that the respondent was in occupation of the land since 1993 but rather described him as a trespasser. Further, that he never pleaded breach of contract and that during hearing he stated that the matter had not been arbitrated by the chief, that the Respondent had not paid for the house but when cornered during cross examination, he admitted the chief had arbitrated over the matter and that the Respondent had paid Kshs.18,000/= for the house.
16. The trial court also discredited the Appellant's case for reasons that he admitted receiving money for the sale of land but did not record the same and as such he could not tell how much was unpaid and did not claim the balance.
17. In the circumstances therefore, the trial court found the respondent's case believable and that the fact that he had paid full amount of the purchase of the parcel of land could not be disregarded considering also the area chief observed the same in his papers that were presented to it.

### **The Appeal**

18. The Appellant was dissatisfied with the lower court's judgment and he lodged the instant appeal. As per the Amended Memorandum of Appeal he set forth the following grounds of appeal:-
  - i. That the Learned Trial Magistrate erred in Law and fact in failing to hold that the Counterclaim by the Defendant had been overtaken by events.
  - ii. That the Learned Trial Magistrate erred in Law and fact in failing to hold that the Defendant had breached the terms of the contract and that the defendant was a trespasser the appellant having obtained the title to the subject matter and was the absolute owner.
  - iii. That the Learned Magistrate erred in Law and fact by making a finding that the Respondent was a bonafide purchaser of 1/8 of an acre yet he had failed to perform his part.
  - iv. That the Learned Trial Magistrate erred in Law and fact in dismissing the Appellant's claim on grounds of not being truthful in evidence yet the evidence on record shows otherwise.
  - v. That the Learned trial Magistrate erred in Law and fact in not appreciating the decision to order for specific performance does not arise and that the claim by



the Respondent was time barred and the court lacked jurisdiction to give such orders.

- vi. That the Learned trial Magistrate erred in Law and fact in ignoring the Appellant's submissions.
  - vii. That the Learned Trial Magistrate misapprehended the law and facts and arrived at an erroneous conclusion.
  - viii. That the Learned trial Magistrate went on a frolic of his own disregarding the pleadings and submissions and as a result arrived at an erroneous conclusion.
19. The Appellant thus prayed that the Appeal be allowed and the trial court's Judgment be set aside, varied and/or vacated.
  20. The Appeal was canvassed through written submissions.

### **Appellant's Submissions**

21. The Appellant submitted that there was no consent from Land Control Board and the initial sale agreement was rendered a nullity by the Respondent's failure to make payment of the full purchase price.
22. He submitted that there was no evidence adduced to show that the respondent paid the balance of Kshs.7000/= for the purchase of the house and disputed declining to receive the said balance as was alleged by the Respondent.
23. He prayed that this court finds that his appeal has merit.

### **Respondent's Submissions**

24. The Respondent submitted that the Appellant's evidence revealed that he was a liar and dishonest person who could not be trusted.
25. He argued that he paid the entire purchase price for the plot and the only balance was for the house. He considered the Appellant's acts of obtaining the title deed for the whole land despite it being subdivided as fraudulent.
26. He posited that his counterclaim was uncontested as no defence was filed on it and the court was right in allowing the same.
27. Regarding the ground on absence of consent from the Land Control Board, the respondent cited the case of Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR for the proposition that lack of consent of Land Control Board does not preclude the court from giving effect to equitable principles in particular the doctrine of constructive trust.
28. The respondent further argued that by the time the sale agreement was entered into, the subject land was not titled and in addition, the issue of consent was not pleaded and neither did it arise before the lower court either through evidence or submissions.
29. He thus prayed that the appeal be dismissed with costs.

### **Analysis & Determination**

30. As a first appellate court, this court has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court.



The principles which guide a first appellate court were summarized in the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123 at P.126 as follows:

“...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 that 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 on the demeanor of a witness is inconsistent with the evidence in the case generally.”

31. Similarly, in the case of *Peters v Sunday Post Ltd* [1958] EA 424 Sir Kenneth O’ Connor, P. rendered the applicable principles as follows:

“...it is strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”

32. With the above legal principles in mind, I will now proceed to determine the Appeal.

33. Having gone through the Amended Memorandum of Appeal, Record of Appeal and the parties’ submissions, I discern the issues arising for determination are:-

- a. Whether this court is seized of the jurisdiction to entertain this appeal.
- b. Whether the trial court lacked jurisdiction to determine the Respondent’s counterclaim.
- c. Whether the trial court erred in dismissing the appellant’s case.
- d. Whether the agreement dated 1.12.1993 was null and void for lack of Land Control Board’s consent.
- e. Whether the trial court erred in law and fact in allowing the Respondent’s claim.

34. Needless to state, if the court is to find that it has no jurisdiction, then it will be an exercise in futility to look at the other issues.

35. The suit in question involved a parcel of land whose description has been given herein.

36. Even though the issue of jurisdiction of this court was not raised, that does not bar the court from addressing it. The Supreme Court of Kenya, in the case of *Nasra Ibrahim Ibren vs Independent Electoral and Boundaries Commission & 2 Others* Supreme Court Petition No. 19 of 2018 stressed the fact that jurisdiction is everything and that a court may raise a jurisdictional issue suo motu. It was held that :-

“A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” v Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus: “What I understand the Court to have been saying is that it is not mandatory



that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...”

37. Thus this court has a duty to satisfy itself that it has the requisite jurisdiction to entertain this appeal. It is apparent that this issue was not raised during the time the court gave directions on the appeal.

38. 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 jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings are 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.”

39. On the same issue of jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others* [2012] eKLR stated as follows: -

“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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

40. The High Court’s jurisdiction is as set out under Article 165 of *the Constitution*. The limitation of this court’s powers is provided for under Sub-Article (5) thereof which states that the High Court shall not have jurisdiction in respect of matters: -

- “(a) .....
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2) (a) & (b).”

41. Article 162 of *the Constitution* provide as follows: -

- “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).
- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
  - (a) ..... and



- (b) the environment and the use and occupation of, and title to, land.

Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.

In compliance with *the Constitution*, the *Environment and Land Court Act* was enacted. At section 13, the Act provides as follows;

- “(1) ) The 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.
- (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, rents, valuations, mining, minerals 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) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (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.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—
- (a) interim or permanent preservation orders including injunctions;
  - (b) prerogative orders;
  - (c) award of damages;
  - (d) compensation;
  - (e) specific performance;
  - (g) restitution;
  - (h) declaration; or



(i) costs

42. The suit in the lower court was filed in 2011, after the promulgation of *the Constitution*. The appeal was filed in 2013, after the enactment of the said Act. By that time, the ELC Court had been established and was already operational in Nakuru.
43. As is clearly set out in the Act, the ELC has both original and appellate jurisdiction to hear matters relating to land and environment. Therefore, in my opinion, the appeal herein ought to have been filed in the ELC Court and not this court.
44. In proceeding with this appeal, this court will be in contravention of *the Constitution* and the Act. The demarcation of jurisdiction between this court and the ELC is very clear. To buttress this point, I will refer to the decision in Republic v Chief Land Registrar & another [2019] eKLR where the court held as follows;

“The jurisdiction of the Environment and Land Court is limited to the disputes contemplated under Article 162(2)(b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. In this regard, my view is that the intention of *the Constitution* is that if an issue arises touching on land in respect of its use, possession, control, title, compulsory acquisition or any other dispute touching on land, then this Court has no jurisdiction. My strong view is that this suit ought to have been transferred to the proper court the moment *the Constitution* of Kenya 2010 divested this court the jurisdiction to hear the case. Buttressed by the provisions of *the Constitution* and section 13 of the *Environment and Land Court Act*, [15] I am clear in my mind that this court cannot properly entertain the application before me. <http://www.kenyalaw.org> - Page 4/16 Republic v Chief Land Registrar & another [2019] eKLR. It is beyond argument that a High Court may not determine matters falling squarely under the jurisdiction of the Employment and Labour Relations Court and the Land and Environment Court, whether it is a substantive hearing or an application such as the instant application. Even with that clear-cut jurisdictional demarcation on paper, sometimes matters camouflaged in what may on the surface appear to be a serious constitutional issues or Judicial Review applications or other matters falling in other High Court divisions may, on a closer scrutiny reveal otherwise- that the germane of the application is actually a labour dispute or land issue falling squarely in the forbidden sphere of the specialized courts! Such is the nature of the application before me. A boundary dispute or enforcing an order relating to a boundary dispute falls squarely in the forbidden sphere of the specialized courts, namely, the Environment and Labour Court. The drafters of *the Constitution* were very clear on the limits of this court's jurisdiction and the jurisdiction of the courts of equal status. Where *the constitution* and legislation expressly confers jurisdiction to a court as in the present case invoking this courts vast jurisdiction is inappropriate. The jurisdictional boundaries of the High Court are clearly spelt out under *the Constitution*.”

45. As stated earlier, the appeal was filed after the creation of the Environment and Land Court (ELC), which came into operation in October 2012. Therefore, the transitional provisions under section 30 of the Act which deal with matters filed before the creation of the ELC, do not come to the aid of the appellant. This was the finding in Christopher Wafula Mutoro v Richard Lordia Lokere [2017] eKLR where the Court of Appeal held that;

“Secondly, section 30 (1) of the ELC Act is a transitional provision. As expressly stated in that section, it operated until the ELC established under the Act comes into operation. The



Act commenced on 30<sup>th</sup> August, 2011. As the ELC found, the Judges of the ELC were appointed on 1<sup>st</sup> October, 2012 and a judge posted to Kitale Court in November, 2012.

So, by 1<sup>st</sup> July, 2015 when the appellant made the first application for transfer of the appeal to the ELC, the Court was operational and the transitional provisions including the ‘Practice Directions’ issued by the Chief Justice as they relate to Section 30 (1) had expired with the consequence that ELC had jurisdiction to entertain the pending appeal.”

46. Having found that the appeal herein falls squarely under the Jurisdiction of the ELC, so what happens next?
47. A court without jurisdiction cannot take any further step. It will be an act in vanity. Thus the next logical step would be to strike out the appeal.
48. However, this court is alive to the fact that at the time the appeal was filed, the issue of where to file such appeals was not clearly known to litigants. As such, striking out the appeal would, in my view, be a draconian step to take. I think that the parties deserve a hearing on merits so that the dispute between them is conclusively resolved.
49. For the foregoing reasons, I direct that this file be transferred to the Environment and Land Court (ELC), Nakuru, for the determination of the appeal.
50. The file shall be forwarded to the Deputy Registrar, ELC Nakuru, to have it assigned a new number and placed before the Judge.
51. The costs of this particular appeal before this court shall be borne by the appellant in any event.
52. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU 5<sup>TH</sup> DAY OF JUNE, 2024.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

**Court Assistant Jeniffer**

**Mr. Ngure for Respondent**

**Appellant – present in person**

