



REPUBLIC OF KENYA



**Ndunda v Nairobi City County & another (Civil Appeal
280 of 2017) [2024] KEHC 8890 (KLR) (Civ) (8 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8890 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 280 OF 2017

CW MEOLI, J

JULY 8, 2024

BETWEEN

MICHAEL MUASYA NDUNDA APPLICANT

AND

NAIROBI CITY COUNTY 1ST RESPONDENT

LEONE ISLAND INTERNATIONAL LIMITED 2ND RESPONDENT

RULING

1. Michael Muasya Ndunda (hereafter the Applicant) filed an appeal on 6.06.2017 against the ruling and order made by Hon. M.W. Njagi (PM) on 29.05.2017 in First Class Magistrate Civil Case No. 34 of 2015.
2. Subsequently, the Applicant filed the Notice of Motion dated 16.11.2022 (the Motion) seeking a temporary injunctive order to restrain Leone Island International Limited (hereafter the 2nd Respondent) whether by itself or through its servants/agents, from transferring, charging or in any other manner dealing with the property known as L.R. No. 12672/45 (the suit property) pending the hearing and determination of the appeal. The Motion is expressed to be brought under Section 3A of the *Civil Procedure Act* (CPA); and Order 40, rules 1(a) and 4(1), and Order 51, Rule 1 of the *Civil Procedure Rules* (CPR).
3. The grounds on the face of the Motion were amplified in the supporting affidavit of the Applicant who stated that he was at all material times the registered proprietor of the suit property which property was later purchased by the 2nd Respondent, pursuant to a decree issued by the trial court on 19.08.2015. The Applicant stated that being dissatisfied with the decree, he filed an application on 19.04.2016 seeking to set aside the judgment and decree on the basis that he was not served with summons to enter



- appearance in the suit. That shortly thereafter, he discovered that the 2nd Respondent had already filed an application on 5.04.2016 seeking a vesting order in its favour concerning the suit property vests.
4. He proceeds to state that the lower court vide a ruling delivered on 29.05.2017, dismissed his application dated 19.04.2016 following which the Applicant's advocate filed an application on 7.06.2017 seeking an order to stay proceedings in the suit, pending hearing and determination of an intended appeal against the dismissal of his application in the lower court, which application was similarly dismissed on 6.08.2018.
 5. The Applicant stated that thereafter, the trial court ordered that the status quo be maintained between the parties and extended such orders subsequently on 3.09.2018; 29.10.2018; and 19.11.2018, upon noting that the 2nd Respondent's application of 5.04.2016 had not been served upon the Applicant. That he was later informed by his advocates that the lower court file had gone missing before they could obtain the typed proceedings and a copy of the impugned ruling of 29.05.2017. That the said advocates therefore filed a record of appeal on 27.09.2021 containing all available documentation at the time, but later managed to collect the typed proceedings on 11.11.2022.
 6. However the 2nd Respondent's application of 5.04.2016 was heard on 17.11.2022, raising apprehension that unless the temporary injunctive order sought is granted, the 2nd Respondent would proceed to register the suit property in its name upon obtaining the vesting order. Thereby defeating the Applicant's rights and interest in the suit property and rendering the appeal nugatory. It was the Applicant's final averment that the 2nd Respondent will not be prejudiced if the order sought is granted, and that the balance of convenience tilts in his favour, in the circumstances.
 7. The Applicant equally swore a further affidavit on 16.12.2022 in further support of the Motion. Therein, he swore that he received information from his advocates that the 2nd Respondent's application dated 5.04.2016 was heard and determined by the lower court on 8.12.2022. That in the circumstances, it was imperative for this court to grant the conservatory order sought, in order to avoid a situation where his appeal would be rendered nugatory.
 8. Nairobi City County (hereafter the 1st Respondent) opposed the Motion by relying on the replying affidavit sworn by its advocate V.A. Oyangi on 17.01.2023. Therein, the advocate deposed that the Motion is fatally defective by virtue of the fact that it has been overtaken by events following the ruling delivered by the lower court on 8.12.2022, resulting in issuance of a vesting order in favour of the 2nd Respondent on 14.12.2022; that the Applicant had previously filed an application before the trial court seeking to stay execution but which application was dismissed; and that the instant Motion is essentially a disguised second application for stay orders.
 9. The advocate further deposed that following entry of judgment on 19.08.2015 in the suit in favour of the 1st Respondent upon default by the Applicant to enter appearance, the former successfully moved the trial court on 9.11.2015 seeking leave to sell the suit property, which leave was granted on 11.11.2015, allowing the 1st Respondent to sell the property by way of a public auction scheduled for 15.12.2015 at 11.00am at Pangani Auction Centre. That on the said date, the 2nd Respondent successfully purchased the suit property.
 10. That the Applicant's subsequent application seeking to set aside the decree issued on 19.08.2015 was dismissed vide the ruling delivered on 29.05.2017 as was the application dated 7.06.2017 seeking to stay delivery of the ruling by the trial court in respect of the 2nd Respondent's vesting application dated 5.04.2016. Hence the instant Motion is intended to delay the matter and prevent the Respondents from realizing the fruits of their judgment. The advocate similarly stated that upon delivery of judgment, an injunctive order cannot be issued, and the Applicant therefore ought to have approached



this court under Order 42, Rule 6 of the CPR. That in any case, the Motion does not meet the threshold for granting the temporary injunctive order sought.

11. The 2nd Respondent similarly resisted the Motion by way of Grounds of Opposition dated 25.01.2024 containing a total of 10 grounds by and large arguing that the Motion is fatally defective; that it does not meet the threshold for granting of a temporary injunction; that the order sought to be stayed has already been executed and has therefore been overtaken by events; that the Applicant should not be heard to interfere with the 2nd Respondent's proprietary interest in the suit property and should seek recourse against the 1st Respondent instead; and finally, that the Motion is a replica of three (3) other similar applications filed before the lower court and is thus res judicata.
12. The 2nd Respondent also relied on the replying affidavit sworn by its advocate Njugi Bernard on like date, essentially echoing the Grounds of Opposition.
13. Before the motion could be disposed of, the 1st Respondent moved this court by way of the notice of preliminary objection dated 12.07.2023 challenging the competency of the Motion, on the grounds that:
 1. This Honourable Court does not have jurisdiction to hear and determine this Application to issue a temporary injunction restraining the 2nd Respondent from dealing with the suit property being L.R. No. 12672/45.
 - a. The subject matter of the dispute before the Chief Magistrates Court in Civil Suit No. 34 of 2015, and in deed the present appeal is immovable property, being L.R. No. 12672/45.
 - b. Article 162(2) of the Constitution as read with Section 4 of the Environment and Land Court Act confer jurisdiction over all matters dealing with land upon the Environment and Land Court.
 - c. The Environment and Land Court is therefore the appropriate forum to determine any questions arising from the lower court's decision.
 - d. As such, the proper forum to ventilate the issues raised by the Applicant is the Environment and Land Court, and not the present court.

Reasons whereof the Respondent prays that the Application dated 16th November 2022 be struck out and or dismissed with costs." (sic)
14. When the parties attended court on 18.03.2024 it was directed that the preliminary objection would be determined first, and depending on the outcome thereof, the Motion would equally be determined by way of this ruling.
15. Whilst supporting the preliminary objection, counsel for the 1st Respondent contended that pursuant to the provisions of Article 162(2) of the Constitution as read together with Section 13(1) and (2) of the Environment and Land Court Act (the ELC Act), jurisdiction in respect of all disputes pertaining to land and the environment vests with the Environment and Land Court (ELC). Moreover that, Article 165(5) of the Constitution expresses that the High Court shall not have jurisdiction in matters falling within the jurisdiction of the courts contemplated under Article 162(2). Counsel for the 1st Respondent citing the decisions in Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another [2018] eKLR and Republic v Karisa Chengo & 2 others [2017] eKLR to argue that the ELC has the requisite jurisdiction to entertain the present appeal, and not this court. Counsel therefore urged this court to strike out or dismiss the Motion.



16. Counsel for the Applicant also filed written submissions on the preliminary objection, submitting that contrary to the claims being raised by the 1st Respondent, the dispute herein is concerned with the subject of accounts; more specifically for rates; and whether the same were owing to the 1st Respondent or not. Counsel further submitted that the crux of the appeal is whether the judgment entered in the suit was regular, the Applicant maintaining that he was never served with summons to enter appearance in the suit. Hence, the appeal did not strictly concern itself with the suit property. It was similarly the submission by counsel that the constitutional and statutory provisions cited by the 1st Respondent in no way bar the High Court from entertaining the present appeal. The court was therefore urged to dismiss the preliminary objection and upon doing so, to determine the Motion.
17. In the court's view, the matter turns on the question of jurisdiction and therefore no purpose will be served by a restatement of the submissions made in respect of the Motion. The Court has considered the notice of preliminary objection and the submissions thereon.
18. As to what constitutes a preliminary objection was aptly considered by the court in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 and defined in the following manner:
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
19. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:
- “It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
20. No doubt the question of jurisdiction is a matter of law. The legal principle being that jurisdiction is everything and that without it, a court cannot perform any further action in a matter. This position was reaffirmed by the Court of Appeal in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR when it held thus:
- “Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989):
- “Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”



These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/ a Diani Tour Travel* (2016) eKLR in the following words:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. 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 court’s 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.”

21. The 1st Respondent’s key argument is that because the subject matter of the dispute is immovable property, it is the ELC and not this court, that possesses the requisite jurisdiction to entertain the Motion, and indeed the appeal, pursuant to Article 162 (2) of the *Constitution*, 2010 and Section 4 of the *ELC Act*. That in the premises, the Motion is incompetent, and it therefore ought to be struck out/ dismissed. In contrast, the Applicant averred and argued that at the crux of the dispute is the question whether the interlocutory judgment entered in the suit was regular, given his averment that he was never served with summons to enter appearance in the first place. That consequently, this court is clothed with the requisite jurisdiction to entertain the Motion.

22. Article 162(2) of the *Constitution* states the following:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

...

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



23. Pursuant to the above, the ELC was established by Section 4 of the ELC Act. Section 13 of the ELC Act spells out the jurisdiction of the ELC 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.
- ...
- (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.
- (5) 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;
 - (f) restitution;
 - (g) declaration; or
 - (h) costs.”

24. From the record, it is apparent the suit in the lower court was filed by the 1st Respondent against the Applicant, for the sum of Kshs. 1,887,590/- alleged to comprise unpaid rates in respect of the suit property. A default judgment was entered in favour of the 1st Respondent against the Applicant, and despite the Applicant’s spirited attempts to have it set aside, the suit property was eventually sold by the 1st Respondent allegedly, by way of a public auction, to the 2nd Respondent. Subsequently the latter swiftly obtained a vesting order in its favour, and which the Applicant is aggrieved with.



25. Clearly, therefore, it can be anticipated that issues pertaining to title as envisaged in Article 162 (2) (b) of the Constitution will in all likelihood arise, even if tangentially, in the appeal. But more specifically, it does appear from a reading of section 13(1) (a) of the ELC Act that appeals from disputes relating to rates, the subject of the suit in the lower court, ought to be heard before the ELC. It is not a good answer for the Applicant to assert that the appeal herein only relates to the propriety of the default judgement. The judgment was not in a vacuum but based on a specific claim for rates. With respect, the Applicant's proposed view of the subject matter of the appeal represents a narrow perspective of the dispute herein.
26. The foregoing is adequate to dispose of the preliminary objection, which is hereby upheld. However, the Court will not strike out the Motion or appeal, but instead will order that the appeal be transferred to the Environment and Land Court, Nairobi for hearing and determination. Costs will abide the outcome of the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8TH DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the 1st Respondent: Mr. Ochiend h/b for Ms. Siati

For the 2nd Respondent: Mr. Njugi

C/A: Erick

