



**Kamotho Maiyo & Mbatia Advocates v Daria & 2 others (Civil Appeal  
377 of 2019) [2024] KEHC 11504 (KLR) (Civ) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11504 (KLR)

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

**CIVIL**

**CIVIL APPEAL 377 OF 2019**

**JM OMIDO, J**

**SEPTEMBER 17, 2024**

**BETWEEN**

**KAMOTHO MAIYO & MBATIA ADVOCATES ..... APPELLANT**

**AND**

**CHARLES PATRICK MAANA DARIA ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL HOUSING CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**HOUSING FINANCE COMPANY LIMITED ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Ruling and Order of Hon. M.W. Murage (Ms.) issued  
on 4th June, 2019 in Milimani Commercial Courts CMCC No. 7402 of 2013.)*

**JUDGMENT**

1. This appeal emanates from the ruling and orders of Hon. M.W. Murage (Ms.) issued on 4<sup>th</sup> June, 2019 in Milimani Commercial Courts CMCC No. 7402 of 2013.
2. The grounds of appeal presented by the Appellant vide the Memorandum of Appeal dated 3<sup>rd</sup> July, 2019 upon which they seek to upset the ruling and order of the lower court are as follows:
  - i. The learned trial Magistrate erred in law and in fact in failing to find that the first Respondent's suit as against the Appellant is statute barred pursuant to Section 4(1) and 4(2) of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya.
  - ii. The learned trial Magistrate erred in law and in fact in failing to find that the trial court lacked jurisdiction to entertain the first Respondent's suit pursuant to Section 159 of the Registered [Land Act](#), Cap 300 Laws of Kenya (now repealed) and Section 2 of the Registration of Titles Act, Cap 281 Laws of Kenya (now repealed).



- iii. The learned trial Magistrate erred in law and in fact by failing to consider the Application, submissions and relevant provisions of the law presented by the Appellant.
  - iv. The whole ruling and order of the learned Magistrate is against the weight of the Appellant's pleadings, submissions and the law.
3. The Court directed that the appeal proceeds by way of written submissions and gave the parties herein time lines for filing their respective submissions.
4. This being the first appellate court, I am required under Section 78 of the Civil Procedure Act and as was espoused in the case of *Sielle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 to reassess, reanalyze and reevaluate the evidence adduced in the Magistrate's Court and draw my conclusions.
5. From my perusal of the record, it would appear that the position that the Appellant took before the lower court was that the first Respondent created a charge over Title Number Nairobi/Block 82/33 registered under the Registered Land Act, Cap 300 Laws of Kenya (repealed) in favour of the third Respondent to secure the sum of Ksh.2,100,000/-.
6. The proceeds from the charge were to be utilized for the purchase of property governed under the regime of the Registration of Titles Act, Cap 281 Laws of Kenya (repealed). The intended transaction however fell through and a dispute arose, necessitating the filing of the suit before the lower court by the first Respondent in which he sought for several reliefs.
7. By an application by motion on notice dated 14<sup>th</sup> February, 2019 expressed to be presented under Order 51 rule 1, Order 2 rule 15(1) (a), (b), (c) and (d) of the Civil Procedure Rules, 2010, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya, the Appellant moved the court seeking the following orders:
  - a. That this Honourable Court be pleased to issue an order that the Plaintiff's suit against the third Defendant/Applicant in the Plaint dated 13<sup>th</sup> October, 2016 be struck out.
  - b. That subject to prayer (a) above, the costs of this application and the suit be provided for as against the Plaintiff/Respondent.
8. The application was premised on the ground that the first Respondent's suit disclosed no cause of action in law as against the Appellant on account of the same being statute barred under the Limitation of Actions Act, Cap 22 Laws of Kenya and on the further ground that the lower court lacked jurisdiction on the account of the provisions of Section 159 of the Registered Land Act, Cap 300 Laws of Kenya (repealed) and Section 2 of the Registration of Titles Act, Cap 281 Laws of Kenya (repealed).
9. The application was resisted by the first Respondent who filed a replying affidavit sworn on 11<sup>th</sup> March, 2013 and grounds of opposition of even date. The second and third Appellants did not participate in the application. It is however to be noted that the 2<sup>nd</sup> Respondent opposed the instant appeal.
10. The motion was canvassed by way of written submissions and in the ruling of the learned Magistrate rendered on 4<sup>th</sup> June, 2019, the same was dismissed with a reservation as to costs. It is the outcome of that ruling that is subject to the instant appeal.
11. When this appeal was placed before the court for directions, an order was issued that the appeal proceeds by way of written submissions and the parties filed their respective submissions. I have had the occasion of perusing the rival submissions and the record in its entirety. The issues for determination, as discernible from the record are as follows:



- a. Whether the Magistrate’s Court had jurisdiction to hear and determine a suit that concerns a charge that was for the amount of Ksh.2,800,000/- over title number Nairobi/Block 82/33, that was registered under the Registered Lands Act, Cap 300 Laws of Kenya (repealed), considering that the said repealed statute, under Section 159 thereof, provided that any dispute that related to an amount of more than Ksh.500,000/- ought to be lodged before the High Court.
  - b. Whether the Magistrate’s Court had jurisdiction to hear and determine a suit that concerns a charge over title number Nairobi/Block 82/33, which property was registered under the Registration of Titles Act, Cap 281 Laws of Kenya (repealed), considering that the said repealed statute, under Section 2 thereof, provided that any dispute that related to any property registered under the said Act ought to be lodged before the High Court.
  - c. Whether the suit before the trial court was statute barred pursuant to Sections 4(1) and 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
12. Although the dispute before the lower court emanated from a charge, which by its very nature concerns land, it is the High Court court, and not the Environment and Land Court that is the proper forum before which an appeal that emanates from a charge is to be heard, as guided by the decision of Co-operative Bank of Kenya Limited v Patrick Kang’ethe Njuguna & 5 others [2017] eKLR where it was held that matters involving mortgages, charges, collection of dues and rents fall within the civil jurisdiction of the High Court and not the Environment and Land Court.
  13. I will now address the issues that I have set out to determine. I will proceed to deal with issues (a) and (b) together and issue (c) separately. The first two issues concern the question whether the lower court was clothed with the requisite jurisdiction to entertain the suit before it, in light of the provisions of Section 159 of Cap 300 and Section 2 of Cap 281, while the third issue, which is also jurisdictional, relates to the question whether the suit filed before the lower court was statute barred under Section 4(1) of Cap 22.
  14. Nyarangi J. in *The Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 held that:
 

“Where the 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... Jurisdiction is everything. Without it, a court has no power to make one more step. Where the 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.”
  15. The jurisdiction of courts flows from *the Constitution*, legislation or both. A court or a tribunal cannot arrogate or confer to itself jurisdiction exceeding that which is conferred on it by law. Once a court of law determines that it does not have jurisdiction to hear and determine a dispute, it must immediately cease handling the same.
  16. Let us read the two provisions of the two retired statutes, the basis upon issues (a) and (b) are presented:
 

The relevant part of Section 159 of Cap 300 provides:

    159. Civil suits and proceedings relating to the title to, or the possession of, land, or to the title to a lease or charge, registered under this Act, or to any interest in the land, lease or charge, being an interest which is registered or registrable under this Act, or which is expressed by this Act



not to require registration, shall be tried by the High Court and, where the value of the subject matters in dispute does not exceed twenty five thousand pounds, by the Resident Magistrate's Court...

The relevant part of Section 2 of Cap 281 provides:

2. In this Act, except where there is something repugnant in the subject or context –“court” means the High Court.
17. Starting with a consideration of the trial court's jurisdiction with regard to the provisions of Section 159 of the repealed Cap 300, it is instructive that the repealed statute provided that where the value of the subject matters in dispute exceeded twenty-five thousand pounds (equivalent to Ksh.500,000/-) the proper forum for the dispute to be filed is the High Court as the Magistrate's court did not have the pecuniary jurisdiction to entertain such a claim.
18. The Appellant therefore proffers the position that as the value of the subject matter in the suit before the lower court was above twenty-five thousand pounds, the lower court did not have the jurisdiction to hear the suit.
19. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents urge that the Magistrate's Court had the pecuniary jurisdiction under Section 7 of the Magistrates Courts Act, Cap 10 Laws of Kenya.
20. There is no dispute that the charge over title number Nairobi/Block 82/33, that was registered under the Registered Land Act, Cap 300 Laws of Kenya (repealed), was for the amount of Ksh.2,800,000/-. The reference to pounds in Section 159 of the repealed Act could only mean the Kenyan pound which was twenty (20/=) shillings. So, the pecuniary jurisdiction of the Magistrate's Court in civil cases was pegged at a limit of Ksh.500,000/-.
21. Cap 300 having been repealed by Section 109 of the Land Registration Act, No. 3 of 2012, it is important for this court to consider the import of the relevant transitional provisions under the latter statute, which are Section 106(2) and 3(a) and Section 107(1), which provide as follows:
  106. Transitional provisions on rights, liabilities and remedies of parties over land
    - (2). Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts.
    - (3). For the avoidance of doubt—
      - (a). any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act. (Underlined emphasis).
  107. Savings and transitional provisions with respect to rights, actions, dispositions
    - (1). Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act. (Underlined emphasis).
22. The law under the above transitional provisions then makes available the operation of Section 159 of Cap 300, in that the lower court had no jurisdiction to entertain the instant dispute as the same



- concerns a charge over property that was for the amount of Ksh.2,800,000/- which is well above Ksh.500,000/-. The proper forum for the dispute to be determined is the High Court.
23. With regard to issue (b), the above transitional provisions of Cap 8D are applicable as the Registration of Titles Act, Cap 281 Laws of Kenya, just like Cap 300, was also repealed by Section 109 of Cap 8D.
24. We have seen above that under Cap 281 that “court” means the High Court except where there is something repugnant in the subject or context. It then follows that the Magistrate’s Court had no jurisdiction to entertain and/or determine a suit that concerns the charge over title number Nairobi/ Block 82/33, which property was registered under Cap 281 Laws of Kenya (repealed), as Section 2 of the said statute conferred upon the High Court the jurisdiction to handle such disputes.
25. The argument that a Magistrate has jurisdiction under Section 7 of Cap 10 to entertain the matter for property registered under Cap 300 and Cap 281 is in my view, in the circumstances, a misdirection. I say so because Section 159 of Cap 300 specifically limited the value of the claim to be filed before the lower court for properties that were registered under the said statute while Section 2 of Cap 281 specified the court before which disputes arising from properties registered under the said statute to be the High Court.
26. Issue (c) is whether the suit before the trial court was statute barred pursuant to Sections 4(1) and 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya. The two Sections provide as follows:
4. Actions of contract and tort and certain other actions
- (1). The following actions may not be brought after the end of six years from the date on which the cause of action accrued–
- (a) actions founded on contract;
  - (b) actions to enforce a recognizance;
  - (c) actions to enforce an award;
  - (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
  - (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
- (2). An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
- Provided that an action for libel or slander may not be brought after the end of twelve months from such date.
27. It is not contested that the dispute before the lower court was one based on contract. The position that the Appellant takes is that the claim as presented by the Respondent before the learned Magistrate was time barred and afoul of Section 4(1)(a) of Cap 22 as the same was filed after the expiry of six years from the date on which the cause of action accrued.
28. The stand that the Appellant takes is that from the amended plaint filed before the lower court, the 1<sup>st</sup> Respondent pleaded that the cause of action arose on 1<sup>st</sup> May, 2002 when he expected to be allocated the property and that his claim for refund is based on the allegations that there was failure to be allocated as such.



29. The 1<sup>st</sup> Respondent on his part stated in his submissions that the cause of action accrued in 2012 when construction was completed and he was not allocated a new house and that as such, the matter before the lower court was filed within the statutory period and is not statute barred.
30. On the part of the 2<sup>nd</sup> Respondent, the submissions on the issue were a replica, more or less, with those of the 1<sup>st</sup> Respondent, that the cause of action accrued in 2012.
31. Although the learned trial Magistrate reached a finding that the cause of action arose in 2012 as was proffered by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, my view is that this is not an issue that I can certainly determine as the same is one that ought to have been investigated in a full trial upon taking evidence. In my view, it is one in respect of which summary trial through an application and affidavit evidence would not have yielded a definite answer.
32. For the reasons stated above that the lower court had no jurisdiction under Section 159 of Cap 300 (repealed) and Section 2 of Cap 281 (repealed), each as read together with Section 106(2) and 3(a) and Section 107(1) of Cap 8D, I reach the persuasion that the appeal herein is merited and succeeds.
33. Accordingly, I proceed to set aside the learned Magistrate's order of 4<sup>th</sup> June, 2016 that dismissed the Appellant's Notice of Motion dated 14<sup>th</sup> February, 2019 and substitute the same with an order allowing the said application, with the result that the suit before the lower court as against the Appellant stands struck out with costs.
34. Costs of the suit before the lower court and of this appeal shall be borne by the 1<sup>st</sup> Respondent.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 17<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**JOE M. OMIDO**

**JUDGE**

For Appellant: Ms. Wangui.

For 1<sup>st</sup> Respondent: Mr. Emirundu holding brief for Mr. Namada.

For 2<sup>nd</sup> Respondent: Mr. Mutwiri holding brief for Mr. Kairaria.

For 3<sup>rd</sup> Respondent: Ms. Sang.

Court Assistant: Ms. Njoroge.

