



Nisala Investments Limited v Parklands Luxury Gardens Limited (Civil Appeal E1029 of 2022) [2024] KEHC 16788 (KLR) (Civ) (11 September 2024) (Judgment)

Neutral citation: [2024] KEHC 16788 (KLR)

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

CIVIL

CIVIL APPEAL E1029 OF 2022

NIO ADAGI, J

SEPTEMBER 11, 2024

BETWEEN

NISALA INVESTMENTS LIMITED APPELLANT

AND

PARKLANDS LUXURY GARDENS LIMITED RESPONDENT

(An Appeal from the Judgment of Hon. E. Kagoni (PM) in Nairobi CMCC. No. 3374 of 2019 delivered on 5/12/2022)

JUDGMENT

1. By a Plaint dated 25.04.2019 and filed in court on 14.05.2019 vide case CMCC. No. 3374 of 2019 Nairobi. The Appellant (Plaintiff) sued the Defendant seeking the following prayers;
 - a. Ksh. 1,597,738 being costs for renovation
 - b. Loss of business to be ascertained at the hearing thereof
 - c. Costs of the suit
 - d. Interest on (a) and (b) above at court rates
2. By a Witten Statement of Defence dated 20.08.2019 and filed in court on 27.08.2019, the Defendant (Respondent) denied the Appellant's claim and contented that the Appellant having failed to lodge a complaint with the National Environment Tribunal the trial court lacked jurisdiction to hear and determine the matter as the National Environment Tribunal (NET) is the only specialized Tribunal to deal with and adjudicate on matter relating to the Environment as well as contravention of the statutory licences.



3. The Respondent also contented that the Appellant's suit was premature and filed in bad faith and was a feeble attempt by the Appellant to unjustly enrich itself while circumventing the provisions of the *Environmental Management and Co-ordination Act*.
4. The Respondent further contented that the Appellant's suit was fatally defective and gave notice that it would be raising a preliminary objection on jurisdiction to be determined in limine.
5. The suit proceeded for hearing virtually on 28.07.2022. PW1 identified himself as Charles Mutinda, a practicing Quantity Surveyor. He elected to produce his Bill of Quantity for LR No. 2091/118/27 as PExhibit 1.
6. When cross-examined, he told the court that he visited the building. That the building is an old building and that it had been damaged. That he was to conduct a dilapidation survey. That it had not dilapidated much. That there were hostels in the building with occupants. That he prepared a Bill of Quantities. That he did a site remeasurement. that there was no need for architectural drawings because the building was already in existence. That the interior required repairs. That the interior, had signs of leakage and damage. That the building was both slab roof and corrugated iron sheets. That all works are renovative. That his Bill of Quantities is an estimation document. That it was the client to get tenders for renovation. That he did not know if there were any tenders.
7. In re-examination, he told the court that his report was based on physical examination of the building. That his report is an estimate of what it was to cost to repair.
8. The Appellant's case proceeded for further hearing, virtually on 07.09.2022. PW2 identified himself as James Irungu, a Director of the Appellant. He elected to adopt his statement dated 26.04.2019 as his evidence in chief.
9. He also elected to adopt his List of Documents dated 25.04.2019, as PExhibit 1-4.
10. When cross-examined, he told the court that the Appellant is an incorporated company. That the name of the title holder of the title he had produced, has changed. That he had not provided proof of the change. That the title is now in the name of the Appellant. That he had not filed a CR12 of the Appellant. That a hostel was being run in the property and he was not the one operating the hostel, he was the landlord. That the tenant was the one operating the hostel and he was paying him rent. That, the tenant ought to pay rent but the damage in the building, have to be dealt with by the occupant. That the building is not a new building. That he has no record of maintenance, prior to 2018. That he has no pre 2018 photos of the building. That, he did not complain to NEMA tribunal about the nuisance. That PW1 was not to do renovations. That renovations were done. That he has not produced receipts for the renovations. That the photos were taken by the Quantity Surveyor. That he did not contract an environmental impact assessor to assess the damage.
11. In re-examination, he told the court that, his claim was for damages in court and not a complaint before the NEMA tribunal. The Plaintiff's case was then closed.
12. The respondent's case also proceeded on the same date. DW1 identified himself as Charles Kamande Macharia, the site manager of the Respondent. He elected to adopt his statement dated 16.11.2020, as his evidence in chief. He told the court that, they didn't damage the Appellant's building. That they had a holding net along the boundary wall to prevent debris from falling into adjacent properties. He therefore prayed for the Appellant's case to be dismissed.
13. When cross-examined, he told the court that chopping could fall over during windy seasons. That the photos before the court, are for dilapidated building. That he has not received letters from the Appellant complaining about the nuisance. That no students vacated the premises as alleged.



14. In re-examination, he told the court that, no tenant left the building as alleged.
15. Upon considering the pleadings before the court, the witness testimonies, exhibits as well as the Parties' submissions, the trial court dismissed the Appellants suit with costs to the Respondent.
16. Being dissatisfied by the court's decision, the Appellant lodged the appeal herein vide a Memorandum of Appeal dated 16.01.2016 raising 9 grounds of appeal.
17. I have perused through the grounds of appeal and the outstanding issues for determination in this appeal are:
 - i. Whether the appeal is incompetent.
 - ii. Whether this court lacks jurisdiction to determine the appeal.
 - iii. Whether the trial court erred in law and in fact in dismissing the Appellant's suit.
18. The Appellant has filed submissions dated 10.6.2024 and the Respondent's submissions are dated 19.06.2024. I have carefully considered the said rival submissions on the appeal and the cited authorities and I will proceed to determine the three issues.

i. Whether the appeal is incompetent.

19. The Respondent submitted that the Appeal is grossly incompetent and that this honourable court lacks jurisdiction to entertain the Appellant's Appeal which has been filed out of time and without leave of the Court.
20. The decision by the trial court was delivered on 15.12.2022. The Memorandum of Appeal dated 16.01.2023 was filed in court on 18.01.2023.
21. Section 79G of the *Civil Procedure Act* provides that appeals originating from the subordinate court should be filed within thirty (30) days from the date of the decree or order appealed against. The thirtieth (30th) day from 15.12.2022 would have been the 15.01.2023. The provisions of Order 50 Rule 4 of the Civil Procedure Rules, 2010, provide for the exclusion of the period between 21st December and 13th January in the next year in computing time and applies to filing of appeals from the subordinate court to the High Court.
22. In the case of *Gabriel Osimbo v Chrispinus Mandare* [2015] eKLR the court held that:

“As to whether the intended appeal is arguable or not, the gravamen of the intended appeal is that the provisions of order 50 rule 4 of the Civil Procedure Rules are applicable with regard to computation of time for purposes of filing appeals from the Subordinate Court to the High Court.
23. See also the case of *Kenya Commercial Bank Ltd v Fredrick Mallya* [2016] eKLR where the court held;

“Order 50 Rule 4 of the Civil Procedure Rules provides that the period between the 21st day of December in any year and the 13th day of January in the year next following shall be omitted from computation of time. Taking this provision into consideration, the appellant ought to have lodged its appeal on 26th January 2016. The appellant filed its Memorandum of Appeal on 25th January 2016. Even without considering the reasons given by the appellant for the purported delay in filing the Appeal, it is apparent that it was well within the time limit contrary to the assertions made by the Respondent.”



24. Taking into account Rule 4 in computing the 30 days, it is evident that the Appellant's appeal which was filed on 18.01.2023 was filed within time.
25. In view of the foregoing, I find that since the judgment was delivered on 15.12.2022, the 30-day period prescribed under Section 79 G of the Act fell within the court's Christmas Recess.
26. Consequently, the days falling between 21/12/2020 and 13/1/2021 ought to be excluded when computing the time within which the appellant was required to file his appeal.
27. When calculated, I find that the 30-day period expired on 15/1/2023 and the Appellant filed this appeal on 18/1/2023 meaning that it was filed within the time stipulated by the law.
28. It is my finding that the appeal is competent and not fatally defective.

ii. Whether this court lacks jurisdiction to determine the appeal.

29. The Respondent contented that the Appellant's suit was fatally defective and gave notice that it would be raising a preliminary objection on jurisdiction to be determined in limine. The Respondent filed a Notice of Preliminary objection dated 23.02.2023 challenging the trial courts jurisdiction to hear and determine the suit. It was the Respondent's contention that only the National Environment Tribunal was specialized to handle the matter.
30. In a Ruling delivered on 20.04.2021, the trial court dismissed the Preliminary Objection on the basis that under Section 9 of the Magistrate's Court Act No. 26 of 2015 the Magistrate's Court shall in exercise of the jurisdiction conferred upon it by Section 26 of the Environment and Land Act No. 19 of 2011 and subject to the pecuniary limits under Section 7 (1) hear and determine claims relating to environment and land generally. He then proceeded to hear the matter although he in the end dismissed it as the Appellant did not have the locus standi to bring the action.
31. The Respondent has submitted that the matter then fell squarely within the ambit of Section 3(3(e.) of the Environmental Management and Coordination Act and this places the jurisdiction to deal with such disputes within the scope of the Environment and Land Court. An issue of jurisdiction having been raised; I have to deal with it spot on.
32. I will, briefly reiterate what the Court of Appeal stated in Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 on the doctrine of jurisdiction in general as follows:

Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in "Words and Phrases Legally Defined", Volume 3 at Page 113 defines court jurisdiction as follows:

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an



arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held as follows:

...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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.

The Supreme Court in In the Matter of Interim Independent Electoral Commission [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of Legislation is clear and there is no ambiguity.

In Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction. In the matter of the Interim Independent Electoral Commission (supra) at paragraph 68 of its ruling, the Supreme Court held 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 itself jurisdiction exceeding that which is conferred upon it by law.

Article 165(5) of the Constitution precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.

33. The trial court considered that it had the jurisdiction to hear and determine the Appellant’s suit pursuant to the provisions of Section 9 of the Magistrate’s Court Act No. 26 of 2015 and in exercise of the jurisdiction conferred upon it by Section 26 of the Environment and Land Act No. 19 of 2011



and therefore proceeded to hear and determine the suit under the ambit of the Land and Environment division of the Magistrate's court.

34. I hold the opinion that this court is without jurisdiction to entertain this appeal. The proper court to have determined this appeal is the Land and Environment Court
35. At this juncture, I am constrained to down tools and I will therefore not get into the merits of the appeal for lack of jurisdiction.

The appeal is dismissed with costs.

DATED, SIGNED and DELIVERED VIRTUALLY at MACHAKOS on 11TH SEPTEMBER 2024.

NOEL I. ADAGI

JUDGE

