Juma v Luyegu (Civil Appeal E152 of 2024)
[2024] KEHC 13026 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13026 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL E152 OF 2024

AC BETT, J

OCTOBER 25, 2024

BETWEEN

EMILY JUMA ..... APPELLANT

AND

EUNICE ASENA LUYEGU ..... RESPONDENT

(Being an application for stay of execution pending hearing and determination of the appeal against a ruling dated 6th September 2024 issued by Hon. J. J. Masiga (PM) in Kakamega MCCMisc. E No. E061 of 2024)

RULING

Background

1. By a Notice of Motion application dated 4th June 2024 in which the Appellant herein is named as a Respondent, the Respondent made an application expressed to be under Order 40 Rules 1, 2 and 3 of the *Civil Procedure Rules*, Section 19 (1) of the Registered Lands Act and Section 3, 3A and 63 of the *Civil Procedure Act*. The Respondent sought orders to have the application certified as urgent and that she be allowed to remove any structures, ramshackles or shanties that may be standing on or erected on her land known as L.R. No. Butsotso/Indangalasia/6356 under the supervision of the OCS, Kakamega Central Police Station.

2. The said application was premised on the following grounds among others:-

> "(1) That the Applicant is the registered owner of land parcel Butsotso/ Indangalasia/6356.
>
> (2) That it is suspected that the defendant is the person who constructed then abandoned the unoccupied structures on the land parcel Butsotso/ Indangalasia/6356.

(3) That the abandoned ramshackles and shanties on land parcel Butsotso/ Indangalasia/6356 are a huge safety risk and are likely to attract squatters, thieves, deviants and other non-law abiding criminals.

(4) .....

(5) .....

(6) That there is no dispute as to the ownership of the land and this application is just a safety precaution to ensure peace prevails during the removal of all ramshackles, shanties and structures perched on the land.

(7) ....."

3. The application was supported by an Affidavit sworn by the Applicant who averred that there was no dispute as to the ownership of the suit land and that she needed to develop the same but needed quiet and vacant possession of the same since the Appellant's husband Barnabas Gabuna Ariga (deceased) somehow used his connections and secured permits to construct on the land but later abandoned the structures leaving shanties. The Respondent averred that she suspected that the Appellant was masquerading as the owner of the land and allowing construction of structures on the land. She attached two photographs of some dilapidated buildings and averred that it was clear from the pictures that the brick structures were abandoned but she needed a court order to demolish the same in order to "avoid legal trouble".

4. On the same date, the trial Magistrate considered the application under certificate of urgency and granted the orders as prayed, ex parte. Armed with the court order, the Respondent proceeded to the suit land and commenced demolition of structures therein, prompting the Appellant to file an application dated 10th June 2024 to stay any further removal of the structures on the suit land. The Appellant's further prayer was for orders inter alia, that the Respondent be restrained from leaving the Court's jurisdiction and that she does compensate the estate of Barnabas G. Ariga in the sum of Kshs. 4,000,000/= and a declaration to issue that the said estate is the lawful owner of the suit land. The Appellant swore an Affidavit in support of her application in which she averred that the suit land was purchased, exclusively used and developed by herself and her deceased husband for over twenty (20) years and was erroneously registered in the Respondent's name. She further averred that the land was developed with a three-storey structure which hosts hostels, chemists, wines and spirit shops and generated a rental income of Kshs. 120,000/= per month. She averred that the orders secured by the Respondent were obtained through perjury in that whereas she alleged that there was no dispute over the land, the Respondent had filed Kakamega Misc. Succession No. E115 of 2022, Eunice Asena Luyegu and Romana Kemunto Magotsi -vs- Emily Juma in which she unsuccessfully tried to obtain the land. It was the Appellant's contention that she was the one in exclusive possession and use of the suit land and the orders obtained by the Respondent would not have been granted had the Respondent made full disclosure. She further stated that the mandatory nature of the orders granted by the trial court for eviction and destruction of investments were made without compelling reasons and without hearing the Appellant and the estate of the deceased and that the court erred in granting the orders despite the admissions by the Respondent contained in her Affidavit.

5. In response to the Appellant's application, the Respondent swore an Affidavit reiterating that she is the registered owner of the suit land and the structures on the suit land had no value. Further, she averred that since the Appellant admitted that she was in possession of the land for over 20 years while earning Kshs. 120,000/= per month as rent, she would in due course, file suit to recover the said amount totaling Kshs. 28,800,000/=. The Respondent faulted the Appellant for failing to seek review or to

appeal against the orders of the trial court and asserted that issues of ownership of land could only be addressed in a substantive suit. She further averred that there was no way the Executive Officer could sign over the suit land valued at over Kshs. 30,000,000/=.

6. Both parties filed lengthy submissions and upon hearing them, the trial court delivered its ruling ion 6th September 2024 in which it dismissed the Appellant's application. Aggrieved by the dismissal of its application, the Appellant promptly filed an appeal against it urging this court to set aside the impugned ruling and grant the following orders:-

   (a) That the Appellate court do find that the learned Magistrate lacked jurisdiction to entertain and issue orders in the Chief Magistrate's court, Misc. Application Kakamega MCC. Misc. E061 of 2024.

   (b) That the Appellate court do find that the orders made on 4th June 2024 and affirmed on 6th September 2024 should not have been used to effect eviction to destroy structures to destroy and disconnect electricity and water supply to the property.

   (c) That the Appellate court do find that the Appellant's/Estate's rights to be heard were violated.

   (d) That the Appellate court do find that the certification of the application was urgent was unjustified and unsupported.

   (e) There be a permanent stay of execution and/or further execution of the orders made on 4th June 2024 and affirmed on 6th September 2024, and an order of discharge of the said orders.

   (f) The Respondent/Eunice Asena Luyegu do withdraw all persons placed on the parcel L.R. Butsotso/Indangalasia/6356.

   (g) The /Appellant's/Estate's tenants and staff do re-obtain un-restricted access and use of the whole parcel L.R. Butsotso/Indangalasia/6356.

   (h) The Appellant/Estate of the late Barnabas Gabuna be at liberty to remove all structures, fences and erections placed on the parcel L.R. Butsotso/Indangalasia/6356 that were set up upon entry based on the orders made on 4th June 2024 and 6th September 2024, at the Respondent's cost.

   (i) The Appellant/Estate of the late Barnabas Gabuna do repair and re-connect electricity and water at the Respondent's cost.

   (j) The Respondent to pay the Appellant/Estate of the late Barnabas Gabuna the value of all demolitions done pursuant to the orders made on 4th June, 2024 and 6th September 2024, for damage to property, cost of restoring the property, and prejudice to tenants, all valued at Kshs. 13,000,000.00.

   (k) That the Appellate court do find, that without prejudice to any other or further order sought and or due, the prayers number "j" above be reserved for hearing, consideration and determination by an ELC Court.

   (l) That any other or further orders do issue in the best of fairness and justice to parties.

   (m) The Respondent do pay costs of the appeal.

7. Contemporaneously with the filing of the appeal, the Appellant filed an application for stay of execution of the orders of the trial court made on 4th September 2024 and 6th September 2024. Due to the nature of the prayers in the appeal, the court directed the parties to address it on the issue of

jurisdiction in the first instance reason being that if this court determines that it lacks jurisdiction to hear and determine the appeal, which ostensibly touches on the ownership of land, then the appeal should be struck off.

8. The Appellant submits that the learned Magistrate explicitly states in the ruling on 6th September 2024 that the matter was a civil case and that he had no jurisdiction to hear it as an Environment and Land Court matter. In the circumstances, she submits that the learned Magistrate exercised his jurisdiction as a civil court and therefore an appeal against such Judgment could only come to the High Court and not to the Environment and Land Court. She urges this court to find that what commenced as a civil case cannot escalate on appeal as a land case. She argues that, she is seeking this court's intervention so that the court can make a determination as to whether the learned Magistrate was right in holding that he had jurisdiction to handle the matter.

9. On her part, the Respondent submits that the matter before the lower court has metamorphosed into a land matter when initially it was a civil case. She contends that the prayers in the Memorandum of Appeal point squarely to the fact that the dispute is an Environment and Land Court matter. She asserts that the predominant test states that in a transaction involving both a sale of land and other services or goods, the jurisdiction lies with the Environment and Land Court if the transaction is mainly for land. Relying on the predominant purpose test and citing Justice Munyao J in Lydia Nyambura Mbugua -vs- Diamond Trust Bank Kenya Limited & Another [2018] eKLR, she maintains that what matters is not so much the purpose of the transaction but the subject matter or issue before court. According to her, this court lacks jurisdiction to hear and determine the appeal in view of its prayers. When the court sought a clarification from her, the Respondent's Advocate stated that the initial prayer before court was only for security to remove unwanted structures from the land as the Respondent had title to the land, whose legitimacy was only questioned later.

10. Upon consideration of the parties' submissions and on perusal of the pleadings of the lower court file and the appeal file, it is the finding of this court that the germane issue before this court is whether the trial court was seized with jurisdiction to issue the orders that it issued on 4th June 2024 and which it declined to set aside on 6th September 2024.

11. Section 13 (2) (d) and (e) of the *Environment and Land Court Act* vests exclusive and appellate jurisdiction on matters relating to environment and land on the Environment and Land Court. It stipulates:-

> " 13. (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.

(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."

12. Land is defined in Article 260 of *the Constitution* to include:-

"(a) the surface of the earth and the subsurface rock;

(b) any body of water on or under the surface;

(c) marine waters in the territorial sea and exclusive economic zone;

(d) natural resources completely contained on or under the surface; and

(e) the air space above the surface."

13. Although the aforestated definition of land is not all-inclusive, it can be construed that land includes all temporary and permanent fixtures affixed on the surface of the earth. In the present context, the fact that the Respondent was seeking orders to demolish structures erected on the land rendered the matter a land matter. I am guided by the case of Co-operative Bank of Kenya Limited -vs- Patrick Kang'ethe Njuguna & 5 others [2017] eKLR where the Court of Appeal held as follows:-

"30. Article 260 aforesaid echoes the traditional definition of land under the common law doctrine known as Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to "whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell". As with our Constitution, the doctrine defines land as the surface thereof, everything above it and below it as well. The doctrine restricts the definition of land use to

necessary and ordinary use and enjoyment of the land and structures upon it (see. Lord Bernstein of Leigh v. Skyviews and General Limited [1978] QB 479).

31. Indeed, considering the above definitions, the inevitable conclusion to be drawn is that land connotes the surface of the land, and/or the surface above it and/or below it.

32. As for land use, the *Black's Law Dictionary, 9th Edn*; gives the basic definition of the word 'use' as being:-

> 'the application or employment of something; esp. a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional'." Emphasis added.

14. In her pleadings, the Respondent tacitly acknowledged the existence of land dispute between her and the Appellant by enjoining her as a party to the suit, and by stating that her deceased husband had constructed some buildings on the suit land which buildings were disused, dilapidated and abandoned. Despite citing the Appellant as a party, the Respondent proceeded to secure ex parte orders to demolish the structures on the suit land.

15. The Appellant in seeking the court's intervention, did not make an application to set aside the order dated 4th June, 2024. To that extent, the Appellant's application was misconceived as it was urging the court to grant it orders of stay of execution in vacuo. The Appellant's prayers before the trial court were for orders that could only lie within the mandate of the Environment and Land Court since there was no application to set aside the orders of the court allowing the Respondent to demolish the structures on the suit land.

16. Applying the predominant test, I find that the suit before the court although couched in such a manner as to avoid it being termed a land dispute, was a land dispute. Jurisdiction therefore did not lie in the trial court from the beginning. However, since the Appellant did not seek to set aside the said order for want of jurisdiction but proceeded to address the same as a land matter by making prayers that only lie within the jurisdiction of the Environment and Land Court, then the court was right in disallowing the application.

17. Despite the Appellant's first ground of appeal being for a declaration that the court lacked jurisdiction to issue the orders it did, I find that this prayer ought to have been made in the application to set aside the orders dated 4th June 2024 or by an appeal against the said orders, or by way of judicial review.

18. A party is bound by its pleadings, and the Appellant's pleadings do not support its prayer for this court to find that it has jurisdiction herein. If the appeal was against the ruling made on 4th June 2024, then this court would have jurisdiction. However, the Appellant did not file an appeal against the said order, choosing to state that it was "subsumed" by the ruling delivered on 6th September 2024. That cannot be the case. The orders were final orders and not ex parte orders. Therefore they could not be confirmed vide the orders made on 6th September 2024.

19. Having painstakingly considered the matter and upon evaluation of both parties' submissions, this court finds that it lacks the jurisdiction to hear and determine this appeal. Although the Appellant's first prayer is for a declaration that the trial court lacked jurisdiction to issue the prayers it did, the court would have been vested with jurisdiction if the appeal was against the order dated 4th June 2024. I find that there is no valid appeal against the orders dated 4th June 2024, as the time to appeal had long lapsed.

It is worth noting that in her application dated 10th June 2024 which resulted in the impugned ruling of 6th September 2024, the Appellant did not incorporate a prayer to set aside the order dated 4th June 2024. The Appellant only made prayers which should have been made before the Environment and Land Court. The trial court rightfully held, in regard to the said application, that it lacked jurisdiction. The appeal is against the said ruling. In the end, I find that this court is not seized with the jurisdiction to hear and determine the appeal.

20. It has been held by the Supreme Court that a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. Being mindful of the decision of the Supreme Court in *Samwel Kamau Macharia & another -vs- Kenya Commercial Bank Limited & 2 others* [2012] eKLR, where the court held as follows:-

> "68. 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."
>
> This court should therefore down its tools as stated in the *Owners of Motor Vessel "Lillian S" -vs- Caltex Oil Kenya Limited* [1989] KLR.

21. The upshot is that I do find that this court being devoid of jurisdiction, the appeal herein is incompetent and is therefore struck out.

22. This court has expressed its finding that the Respondent abused the process of the court in securing the orders from a court that lacked jurisdiction. She also did not disclose to the court the fact that there existed a dispute between her and the Appellant over the land which necessitated that the Appellant be given an opportunity to be heard before the drastic orders of demolition were made. To that extent, the Respondent was in violation of the Appellant's right to a fair hearing as guaranteed by Article 50 (1) of *the Constitution*. For the said reason, I will make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2024.

A. C. BETT

JUDGE

In the presence of:

Ms. Waweru for Appellant

Ms. Mburu for Respondent

Court Assistant: Polycap