



REPUBLIC OF KENYA



KENYA LAW
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**Muriuki v Wagai (Civil Appeal E134 of 2021)
[2023] KEHC 1279 (KLR) (10 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1279 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E134 OF 2021
DKN MAGARE, J
FEBRUARY 10, 2023**

BETWEEN

STEPHEN MAINA MURIUKI APPELLANT

AND

BENSON KIBIKU WAGAI RESPONDENT

JUDGMENT

1. This matter came before me on January 26, 2023 for notice to show cause as to why the same should not be dismissed for want to prosecution and reactivation. The parties indicated they were ready to proceed and actually argued the appeal. Mr Nabende argued me to nullify the title deed in issue as the same had fraudulently been issued.
2. According to counsel, the learned magistrate, Hon I Orenge, pm erred in entering judgment in favour of the Respondent in the lower court when there are issues of the amounts paid pursuant to a sale agreement dated November 23, 2005.
3. The learned counsel for the Respondent urged me to dismiss the Appeal, as unmeritorious and being a land matter.
4. I have perused the Memorandum of appeal. The Appellant seeks the following prayers in this Appeal were:-
 - a. This appeal be allowed
 - b. Judgment in the court be set aside and the Respondent pay damages for breach of sale agreement dated November 23, 2005
 - c. The Respondent be condemned to pay mesne profits for not less than 82 months or the period that the court deems fit.



- d. Costs and interest.
5. Despite prodding from the court, the Appellant did not find provisions of Articles 162(2)b and 165(5) b of *the Constitution* useful in this matter.
6. The dispute involves the issue land where the parties were disputing over title, ownership and possession, fraud on land and mesne profits together with damages arising from the sale of land. The damages were in addition to other prayers sought.
7. The lower Court had found in favour of the Respondent as an owner of the suit land pursuant to the sale agreement of November 23, 2005.
8. From the dispute the parties had, the same was clearly over ownership, possession and title to land. The dispute falls squarely within the jurisdiction of one of the courts contemplated in Article 162(2) of *the Constitution*, which provides as follows:-

“162(2) Parliament shall establish Court with the states of the High Court to hear and determine disputes relating to;-

- a.
- b. The environment and the use and occupation of title to land.”
9. The Courts contemplated under Article 162(2) b are established under section 4 of the *Environment and Land Court Act* No 19 of 2011. They have jurisdiction circumscribed under the Section 13(2) of the said act, that provides as doth :-
 - (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.
10. It is also noted that this matter proceeded in the subordinate court as a land dispute, that is, a matter dealing with the possession, ownership and title to land. The appeal was then preferred to this court.
11. In Nakuru Civil Appeal No E16 of 2020-0 *Johnstone Kiarie Kamira v Joyce Gathoni Kiarie (Suing as the administrator of the estate of Joseph Wanyoike Kiarie (Deceased) and 2 others(2023) eKLR* , this court had stated as doth:-

“on the other hand, the Jurisdiction of this Court is circumscribed in Article 165 of *the Constitution*. The Court is said to have unlimited original jurisdiction in Criminal and Civil Matters. The High Court, under Article 165 3(b) has jurisdiction to determine whether a right of a fundamental freedom of a bill of Rights has been violated, infringed or threatened.



However, by dint of Article 165 (5) this court does not have Jurisdiction over matters:-

- a. reserved for the exclusive jurisdiction of the Supreme Court.
 - b. Falling within the jurisdiction of Courts contemplated in Article 162(2) of *the Constitution*.
12. Before proceeding with the matter on merit, the Court was duty bound to satisfy itself that it has both the subject matter jurisdiction and jurisdiction over the parties, that is jurisdiction, *ratione materiae* and *ratione personae*. Being adults of sound mind the court has personal jurisdiction over them. That is why even where the court has no subject matter jurisdiction, the court still has authority under section 27 of the *Civil Procedure Act* to impose costs and even indicate amounts or the extent. The question is whether the court has subject matter jurisdiction, jurisdiction *ratione materiae*
13. The issue of jurisdiction cannot be conferred by parties or imagined. The Court either has jurisdiction or it does not. Jurisdiction is dealt with in a manner of a Preliminary Objection. In case of appeal, the grounds of appeal and the prayers sought form the basis for jurisdiction. It is not based on some predominant issue or craft or innovation by parties or the court that vests jurisdiction on the court. In *Macharia & Another v KCB & 2 Others* the Supreme Court stated as follows: -
- “A Court’s jurisdiction flows from either *the Constitution* or Legislation or both. Thus a Court 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.
- ...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 will be within its authority to prescribe the jurisdiction of such a Court or Tribunal by statute law.”
14. It is simple terms jurisdiction is determined from the subject matter of the appeal. Subject matter is the core dispute the court is required to determine and render itself at the end of the day. This is what people in the streets classify the matter to be about. What are parties disputing about. It real does not matter how the same is clothed in nice king’s language, with a little sprinkling of a dead language, known only to lawyers and clergy, Latin. The core jurisdiction giving material comes from that one issue, if determined against the Claimant, everything else falls. For example, in a motor vehicle accident, the jurisdiction giving material is liability. If the liability arises from employment, then one court has jurisdiction, if it arises from a tort, then another has jurisdiction. It real matters not what submissions or documentation on quantum one has.
15. That is why the court had to ask the parties what they wanted me to order after I retired to write this judgment. The Appellant expected the court to nullify the transfer and re-transfer the subject land himself. That is the subject matter. This means that there has to be an enquiry as to the genuineness of title held by the Respondent. If the Appellant is to succeed, an order will be issued to cancel the Title and for the land registrar to be ordered to issue a proper and genuine Title Deed to the Appellant.
16. The result is that the subject matter, is land. not just land- occupation, title, user and ownership of land. Mesne profits arise out of unlawful user of land. Damages arise out of non-user of land. Fictitious or fraudulently obtained titles deprive parties of ownership and title. Thus, having found that the case is over enforceable interest over land, I am obligated to declare, which I now do, that I find no basis



- jurisdiction as *ratione materiae* is within the ambits of another court. The subject matter should be established without arguments. It is not a moving target.
17. The jurisdiction of that Court is set out in Section 13 (2) (d) of the said Act which include powers to hear and determine disputes relating to Public, Private and Community Law and Contracts choses in action of other instruments grants any enforceable interests in law.
 18. Indeed, the remedies sought are remedies the Environment and Land Court has jurisdiction to issue under section 13 (7) *Environment and Land Court Act* (c), (d),
 - (e) as follows:-
 - c. Award of damages
 - d. Compensation
 - g. Restitution
 19. To my knowledge title and title deeds are an “enforceable interest in land” and can only be dealt with in the Environment and land Court. The Appeal has not been filed in that court.
 20. There is no dispute as contemplated under Article 165 (5) for this Court to hear this dispute. This court is not permitted to proceed and determine title to land. The Environment and land Court has both original and appellate Jurisdiction to deal with the Subject matter.
 21. Having determined that this is a matter involving land as contemplated under Article 162 (2) b of *the Constitution*. I find that this Court has no jurisdiction and as such the Court is bound to down tools. The question then is what to do with the Appeal before me.
 22. There is an argument, which I have dismissed before, that this Court has jurisdiction to transfer an Appeal improperly filed to the Environment and land Court for hearing and determination. This means, even without jurisdiction, this court can confer jurisdiction itself to transfer the case.
 23. Jurisdiction is an authority to make decision which arises from statutory or Constitutional imperatives. In this case, jurisdiction is circumscribed by *the Constitution* itself and as such there is no authority to do anything further. You either have it or you don't. there are no two ways about it
 24. The court of appeal Owners of *Motor Vehicle Vessel “Lilians – v – Caltex Oil (Kenya)Ltd (1989)eKLR* , Nyarangi JA, as then he was, held as follows:

“Jurisdiction is everything without it, a Court has no powe4r 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 i8t the moment it holds, the opinion that it is without jurisdiction.”
 25. I agree with Hon. Justice D. S. Majanja in Kenya Red Cross Society Ltd Vs Kennedy Arani Bende (2023)eKLR where he posited:-

“Since the appeal was filed in a Court without jurisdiction, if cannot be saved by transfer to ELRC. It can only be struck out.”
 26. It has also been suggested that the Supreme Court allowed life to be breathed into a nullity in case of Mike *Mbuvi Sonko v the Speaker of the County Assembly of Nairobi (2022)eKLR*. I have perused the said decision and I see nothing warranting the position. The Court found it had no jurisdiction to deal with issues raised in the Petition and struck out the petition. Nevertheless, they gave jurisprudential



guidance on certain aspects as the highest Court in the land. They did not deal with any aspect of matters raised in that petition.

27. The only time transfer can be done is when there is an issue of the predominance subject matter. This was dealt with in extention in the case of Mohammed Ali Baadi & Others v AG & 11 Others (2018) Eklr. The Court set out the correct position in law at paragraph 105, where they stated as doth regarding mixed grill issues, where some can be hear in some court or another:

“the courts have resolved the issue by requiring what most substantial question or issue is.”

28. In *Patrick Musimba v National Land Commission & 4 Others* and stated, succinctly as doth:-

“It could not have been the intention of the draftsman of *the Constitution* that when the Court was faced with a mixture of causes of action touching on *the Constitution*, especially on fundamental rights a separationalistic approach was to be adopted by the Court and have the claim dispatched to one Court and the other half was retained.”

29. The best approach is to determine whether the predominant purpose falls within the High Court or Courts of equal status and from pleadings when hybrid questions are raised, they are then sent to a Court with the predominant question.

30. Where there is no mixture of questions outside land questions of title, possession and ownership of land, the Appeal is incapable of being salvaged.

31. Odunga J, in *Wambua v Kamondia & 3 Others (2022) IKEHC 10426 KLR* noted that:-

“there are two types of jurisdictional questions. The first one is where a Court has no jurisdiction to embark on investigation into a matter. In such a case, there is nothing to be transferred. The second one where the Court has jurisdiction at the inception which is affected subsequently, the later can be transferred.

32. Having fallen within the former, the appeal is filed in a wrong forum and cannot be salvaged. The appeal herein is struck out with costs to the Respondent for lack of jurisdiction.

33. As regards costs, the power of this Court is circumscribed in Section 27 of the *Civil Procedure Act*, which provides as doth: -

- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

- (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.”

34. Therefore, from the standpoint of law, costs are at the discretion of the Court that decides the case. Not unlike any other discretion, the discretion on costs has to be judicious and not capriciously, whimsically or arbitrarily.



35. The Respondent has succeeded in the suit and as such may not be deprived wholly or partially of the costs of the Action without a good reason. I have not seen any good reason to deprive the Respondent that are well deserved.
36. To assuage the pain of the Respondent having to defend a claim in a wrong court and to stop the folly of the Appellant of filing Appeals and walking away with no consequences of the unnecessary expenses I award costs to the Respondent. I note that noting that the subject matter was valued at Kshs 790,000/= in 2005. Though the same may be higher now, I posit that costs are not real meant to punish the other side or to underwrite the winning parties's cost. Further, there were minimum activities in this matter. I therefore award the Respondent costs of Kshs 75,000/= which the Appellant shall pay within 30 days, in default execution do issue.

Disposition

37. Court therefore makes the following orders:-
- a. The Appeal herein is struck out with Costs
 - b. The Appellant to pay costs of Kshs 75,000/= to the Respondent with 30 days, in default execution do issue.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 10TH DAY OF FEBRUARY, 2023

HON MR JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

Delivered virtually in the presence of;

No Appearance for the Appellant.

Mr Mbugua Karanja for the Respondent

Appellant present

Nancy Bor, Court Assistant.

