



REPUBLIC OF KENYA



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**Abubakar v Kanyotu (Civil Appeal 38 of 2017)
[2023] KEHC 1896 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1896 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 38 OF 2017
RM MWONGO, J
MARCH 16, 2023**

BETWEEN

HASIA IRERI ABUBAKAR APPELLANT

AND

JANE MUTHONI KANYOTU RESPONDENT

*(Being an appeal against the Judgment of JA Kasam (SRM) delivered
on 18th August, 2017, in Kerugoya Civil Case No 283 of 2013)*

JUDGMENT

Background

1. In 2013, Jane Kanyotu sued Hasia Abubakar in the lower court in Kerugoya civil case number 283 of 2013. In her plaint she sought to recover rent arrears for house No 25 in Kanyotu Estate, Kerugoya.
2. The plaint sought:
 - a. Unpaid rent of Kshs 238,000 and an order for the defendant to vacate the plaintiff's premises in Kanyotu Estate in 7 days and in default she be forcefully evicted by auctioneers of the plaintiff's choice.
 - b. Costs of the suit and interest.
3. The trial court issued judgment on August 18, 2017 where the court awarded the payment of Kshs 238,000/= to the plaintiff and ordered the defendant to vacate the plaintiff's premises in 7 days, and in default, the defendant to be forcibly evicted by auctioneers of the plaintiff's choice.
4. Dissatisfied with the trial court's decision, Hasia Abubakar, the appellant, filed a memorandum of appeal dated September 5, 2017 with the following grounds of appeal:



1. That the learned magistrate erred in law and in fact in condemning an innocent litigant for mistake occasioned by court.
2. That the learned magistrate erred in law and in fact in disregarding the evidence tendered by the appellant.
3. That the learned magistrate erred in law and in fact by basing her judgment on no evidence or misapprehension of the evidence on record.
4. That the learned magistrate erred in law in failing to appreciate and find that the appellant had proved the case on balance of probability

Appellant's Submissions

Whether the learned magistrate erred in law and in fact in condemning an innocent litigant for mistake occasioned by the court

5. The respondent had sought for an order for the payment of Kshs 238,000/= The claim for Kshs 238,000/= was not strictly proved. The respondent in her testimony and her submissions only claimed the amount of Kshs 185,000/= which was indicated in the caretaker's report produced as PEX8 which amount the appellant did not specifically plead in her plaint dated October 10, 2013. It is trite law that an order for specific damages ought to be pleaded and strictly proved.
6. The appellant cites the case of In *Richard Okuku Oloo v South Nyanza Sugar Co Ltd* [2013] eKLR where the court held as follows:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

7. The respondent did not state how they arrived at the amount of Kshs 238,000/ = but they only claimed arrears of Kshs 185,000/= which was not specifically pleaded in the plaint. The court erred by issuing a judgment in favour of the respondent despite the fact that the amount of Kshs 238,000/= was not strictly proved in this case.
8. The learned magistrate also made an error in finding that the appellant had acknowledged the non-payment of rent and that the same was not challenged. The court proceedings clearly show that the appellant testified that she had no rent arrears and that she had paid the rent in excess of Kshs 22,000/=
9. The learned magistrate also erred in finding that the appellant did not produce receipt of payment whereas the appellant had produced a bundle of receipt marked as DEX2 which showed that the appellant had made a total rent payment of Kshs 182,000/ =

Whether the learned magistrate erred in law and in fact by basing her judgment on no evidence or misapprehension of the evidence on record

10. The appellant testified that she had no rent arrears and that she actually had made an overpayment amounting to Kshs 22,000/=. The appellant produced receipts which showed that she had paid the amount of Kshs 182,000/= and also testified that there were amounts which she had paid which she had not been issued with the payment receipts.



11. The appellant also argued that the record keeping by the respondent was not proper since the appellant's receipts could not reconcile with the respondent's receipts which evidence the court totally disregarded. The court also failed to take into account that there were discrepancies in the amounts of the receipt produced by the appellant and the respondent. The court totally failed to analyse the evidence tendered by the parties regarding the issue raised by the respondent of the appellant's failure to keep the compound in a good condition.

Respondent's Submissions

Jurisdiction

12. The respondent argues that from a perusal of the judgement and decree, it is clear that the cause of action in the suit and on appeal is for payment of arrears of rent and eviction of the appellant from the respondents estate known as Kanyotu Estate.
13. The respondent submits that this court lacks jurisdiction to entertain this appeal. Under article 162 (2) of the Constitution of Kenya pertaining to system of courts Parliament was mandated to:
 - (2) "establish courts with the status of the High Court to hear and determine disputes relating to:-
 - a. employment and labour relations; and
 - b. the environment and the use and occupation of, and title to land
 - c. Parliament shall determine the jurisdiction contemplated in clause 2".
14. The respondent submits that a dispute concerning issues of rent and eviction from the rental premises is in the province of the environment and land as provided in section 13 (1) and (2) of the Environment and Land Court Act, 2011. That court has original ad appellate jurisdiction in the matter, and this court has no such jurisdiction.

Failure To Make A Proper Finding Of Evidence

15. The learned trial court rightly appreciated that the plaintiffs claim was for arrears of rent which as of October 2013 stood at Kenya shillings two hundred and thirty-eight thousand (Kshs 238,000/=) and after subsequent payments by the appellant the balance thereof was Kenya shillings one hundred and eighty-five thousand (Kshs 185,000/=) as on the date of trial. The learned trial court found the denial of arrears by the appellant to have been devoid of truth by a tenant who had issued and apologised for issuing bouncing cheques.

Issues for Determination

16. The issues arising for determination are as follows:
 - a. Whether this court has jurisdiction to deal with the subject matter of the appeal
 - b. Whether the respondent strictly proved the claim for the payment of Kshs 238,000/

Analysis and Determination

17. The first matter to dispose of is the question of jurisdiction, for jurisdiction is everything and without it, the court cannot move.



18. It is not in dispute that the subject matter of the suit and of the appeal is rent and eviction orders.
19. I have perused the plaint. Paragraph 2 claims unpaid rent with interest; the defence denies the plaintiff is the proper landlord or that she had *locus standi* to sue the defendant “in respect of the tenancy at Kanyotu Estate”
20. In her supporting affidavit to an application in the lower court (page 121 of the record of appeal) the defendant/ appellant asserts that she is a tenant in house number 25 Kanyotu Estate; that she had filed Embu Rent Restriction case number 1 of 2013 when the plaintiff evicted her.
21. The respondent has thus properly raised the question of jurisdiction. As argued by the respondent, article 162(2)(b) of the Constitution provides for the system of courts as follows:

“ 162 System of courts:

- (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2)
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.”

22. Section 4 of the Environment and Land Court Act, 2012 establishes the ELC Court, Section 13 provides for the jurisdiction of the ELC court as follows:

“ 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.”

23. Under sections 4 and 13 (1) of the Environment Land court Act this court has the legal mandate to hear any matter related to environment and land, including the issue of rent, which concerns the use of or nature of occupation of, land.

24. The question as to whether the High Court could exercise jurisdiction held by any other of the equal status courts was resolved in the seminal case of the ELC (Malindi) in the Karisa Chengo v Law Society of Kenya (2014) eKLR, which were all the way to the Supreme Court.

25. Further, in the now famous case of “Owners of Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited (1989) IKLR the Court of Appeal dealt with jurisdiction thus:

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion 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”.

26. In Benjamin Leonard Macfoy United Africa Company Limited (UK)[1962] AC 152, the English Court succinctly made the point that:

“[T]he court has discretion in matters that are voidable not to proceedings that are a nullity for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court ...”

And;

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

Should this court act any further in this appeal, its action would be founded on no jurisdiction, and all that it would achieve would be a nullity and void.

27. In Republic v Karisa Chengo & 2 others [2017] eKLR the Supreme Court held:

“(79) It follows from the above analysis that, although the High Court and the specialized courts are of the same status, as stated, they are different courts. It also follows that the Judges appointed to those courts exercise varying jurisdictions, depending upon the particular courts to which they were appointed. From a reading of the statutes regulating the specialized courts, it is a logical inference, in our view, that their jurisdictions are limited to the matters provided for in those statutes. Such an inference is reinforced by and flows from article 165(5) of the Constitution, which prohibits the High Court from exercising jurisdiction in respect of matters “reserved for the exclusive



jurisdiction of the supreme court under this constitution; or (b) falling within the jurisdiction of the courts contemplated in article 162(2)".

Conclusion

28. I need not belabour this point in respect of which there is now innumerable authority. I need only say that the High Court has no jurisdiction to entertain a matter which is in the domain of the jurisdiction of the Environment and Land Court or the Employment and Labour Relations Court.
29. Issues of rent concern the use and or occupation of land which is the province of the ELC court, both at first instance and on appeal.
30. Accordingly, this court has no basis to entertain the appeal herein, and it is terminated summarily for lack of jurisdiction. In the result, there is no need to consider the outstanding issues on merit.
31. Costs to the respondent.
32. Orders accordingly.

DELIVERED AT KERUGOYA THIS 16TH DAY OF MARCH, 2023.

RICHARD MWONGO

JUDGE

In the presence of:

1. Mukahya holding brief for Makworo for Appellant
2. Muchira for Respondent.

