



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO. 39 OF 2020

TERESIA WANJIRU MBUGUAAPPELLANT

VERSUS

MOSES GIKONYO HIRAM.....RESPONDENT

(Being an Appeal from the Ruling and Order delivered on 15th September 2020, by

Hon A.Maina in Thika ELC Case No. 336 of 2012 Moses Gikonyo

Hiram...Vs... John Kamau & Anor)

JUDGMENT

The Appellant **Teresiah Wanjiru Mbugua** was the 2nd Defendant while the Respondent **Moses Gikonyo Hiram**, was the Plaintiff in Thika **Chief Magistrates Court ELC Case No. 336 of 2012**.

By a Notice of Motion Application dated **1st September 2016**, the 2nd Defendant (Appellant) sought for orders that;

- 1. That the process server Simon Kamau Ngigi be summoned to be cross examined upon the veracity or otherwise of his Affidavit of Service sworn on 8th June 2012.***
- 2. That the Decree dated 11th October 2013, against the 2nd Defendant be set aside .***
- 3. That the 2nd Defendant be allowed to file her Defence as per the draft attached hereto***
- 4. That the 2nd Defendant be allowed to file list of witnesses, statements and List of documents***
- 5. That cost hereof be provided for.***

The Application was premised on the grounds that the Court has the powers to set aside the Decree . That failure to Enter Appearance was not deliberate as the 2nd Defendant was neither served with the **Summons to Enter Appearance** nor the **Plaint** as alleged by the Process Server. That if the Decree is not set aside, the 2nd Defendant stands to suffer great prejudice as her **title deed** would be canceled.

That the 2nd Defendant only realized the existence of the suit on **24th August 2016**, when she was summoned to **Githurai Kimbo Police Station** and informed of the existence of the case. Further, that the 2nd Defendant has had possession of the suit property since **2010**, and as a result of the Ex parte Decree, the 2nd Defendant has been charged with offences under **Section 91 and 320 of the Penal Code** of Forcible Detainer and Obtaining Registration by False Pretences. That the Application has been made without delay.

That the 2nd Defendant has **a prima facie case** valid and arguable case against the Plaintiff's case as per the draft Defence and it is in the interest of justice that the 2nd Defendant is allowed to defend the suit and not be condemned unheard . That she has been greatly prejudiced in the case of execution. Further that the 2nd Defendant had sued the Plaintiff in **ELC No. 1385 of 2013**, and the Plaintiff's aware of the said suit . That the Plaintiff has not produced a title deed like the 2nd Defendant, and the letter from **Mwana Muka Housing Cooperative Society** cannot supersede the title deed.

In her Supporting Affidavit, **Teresia Wanjiru Mbugua** averred that she has had possession of the land and has developed it . That had she been served with the suit paper, she had a retained Counsel to appear on her behalf and that in the **ELC Suit**, she had obtained interim orders

and the said suit was filed after the Plaintiff tried to interfere with her ownership. She therefore urged the Court to allow the Application

The Application was opposed and the Plaintiff (Respondent) filed a Replying Affidavit sworn by **6th July 2017** by **Moses Gikonyo Hiram** who averred that the Application was an afterthought and had been brought after an inexcusable and inordinate delay. That the Application is bad in law and therefore incompetent. It was his contention that the Summons and Plaint in respect of the matter were served on the 2nd Defendant on **11th May 2012**, as per the Affidavit of Service of **Simon Kamau Ngigi** sworn on **8th June 2012**.

That the 2nd Defendant was aware of the suit, but chose not to oppose it as she knew she had been conned by the 1st Defendant. Further, that the 2nd Defendant was aware that they had several meetings to resolve the matter at the offices of **Mwana Mukia Housing Cooperative Society** and she was informed that her documents had been forged. That the 1st Defendant had fraudulently sold the suit property to the 2nd Defendant and after she discovered the same, she complained to the Police and he was charged at the **Makadara Law Courts vide Criminal Case No. 570 of 2011**. That he was the one who developed the plot upto the current status, and the 2nd Defendant had attempted to enter into the premises, hence the charges. That he is the bonafide purchaser for value and he was allocated the same after balloting.

The Application was canvassed by way of written submissions and on **15th September 2020**, **Hon A.M Maina** delivered her Ruling and stated that ;

“Having considered all the above mentioned factors; I find that the Application dated 1st September 2016 by the 2nd Defendant lacks merit and I dismiss the same with costs to the Plaintiff.”

The Appellant being aggrieved with the above determination filed the instant Memorandum of Appeal dated **23rd September 2020**, seeking for orders that;

- a) This Appeal be allowed***
- b) The Ruling and Order of the Chief Magistrate Court at Thika in ELC Case No. 336 of 2012, dismissing the Appellant Application dated 1st September 2016, be set aside and instead an order striking out the suit for want of jurisdiction.***
- c) The costs of this Appeal be borne by the Respondents***
- d) Any other order that the Court may deem just in the circumstances.***

The grounds upon which the appeal is grounded are;

- 1. The Learned Magistrate erred in law and fact in relying on the Affidavit of service served by the process server when the said Affidavit of service was in challenge and the prayer sought by the Appellant to have the process server cross examined which prayer could not be granted after the Court directing that the Application dated 1st September 2020 be canvassed by way of written submissions.***
- 2. The Learned Magistrate erred in Law and in fact in holding that the Appellant knew of the existence of ELC Suit No. 336 of 2012 as deponed by one Alexander Ochwo Alela when in fact that averment was made on 29th September 2014 after the Judgment had been entered on 11th October 2013, and the Decree issued on 16th December 2013.***
- 3. The Learned Magistrate erred in Law and in fact in holding that the Judgment entered on 11th October 2013 was a regular Judgment when in fact there was evidence to the contrary.***
- 4. The Learned Magistrate erred in Law and in fact in holding that the Judgment entered on 11th October 2031 was regular, when in deed the Court had no jurisdiction to enter the said Judgment nor entertain the proceedings in the first case.***
- 5. The Learned Magistrate erred in Law and in fact in holding that the Application for setting aside had been brought 7 years later, while in fact such delay had been adequately explained.***
- 6. The Learned Magistrate erred in Law and in fact in holding that the Appellant had failed to obtain stay orders for the execution of the decree, when in fact it is not an issue for consideration in considering an Application for setting aside of a decree of a Judgment. The said issue was also a legal issue that was to be handled by the Appellant's Advocate and not the Appellant. .***
- 7. The Learned Magistrate erred in Law and in fact in holding that the Appellant had delayed in having the matter fixed for hearing after the order/ Ruling issued on 2nd May 2019 in ELC Case No. 47 of 2018 when the delay had been adequately explained. .***

The Appeal was canvassed with by way of written submissions and the Appellant through the **Law Firm of Ngania & Company Advocates** filed his written submission dated **13th May 2021**, and submitted that the Learned Magistrate fell in error in failing to determine the issue of service merely because the Court had directed that the matter proceed by way of written submissions. It was thus submitted that

upon the Court considering the Application and realizing that the cross examination of the process server was a crucial prayer in the Application, the trial magistrate was obligated to order attendance of the Process Server in order to reach a just determination and that the Learned magistrate upheld technicality beyond the call of duty.

It was further submitted that the Affidavit of Service referred to by the trial Court of one **Alexander Ochwo Alela** was sworn on **6th May 2015**, after the Judgment was entered on **11th October 2013**, and it was therefore erroneous for the court to hold that the Appellant was aware and as such the same could not be set aside. It was the Appellant further submissions that the suit was filed on **9th May 2012**, and the Applicable law at the time was the **Land Registration Act 2012**, and **Section 2 of the Act** defined the Court as the Environment and Land Court established under the Environment and Land Court Act 2011. That the said Section was amended in **2016**, to include other Courts having jurisdiction on matters relating to land. That at the time of filing of the suit the Magistrate Courts had no jurisdiction and the amendment introduced in **2016** is not Applicable to the instant suit. It was further submitted that the transitional provision under **Section 30 of the Environment and Land Court Act No. 19 of 2011** is not applicable in this matter as the case was not pending before any Court of competent jurisdiction by virtue of **Section 159 of the Registered Land Act**, and as such the same does not provide any reprieve to the Respondent. That Jurisdiction can be raised at any point and the Decree made by the Court was without jurisdiction. That the Appellant filed an Application on **28th July 2020**, explaining the delay in setting the matter down for hearing and it was therefore not correct for the Court to hold that the Appellant had not explained the delay. The Appellant further submitted that he had demonstrated that the Court did not have jurisdiction and further the Magistrate did not exercise her **discretion judiciously**, when she dismissed the Application and the Court was urged to allow the Appeal.

The Respondent filed his written submissions dated **5th July 2021**, and submitted that it wouldn't have been possible to cross examine the process server since the Court directed that the Application be heard by way of written submissions and the Appellant was cognizant of this fact and chose to remain silent when the onus was on them to move the Court and seek direction. That there is a presumption of service and the burden lies on the party questioning it to show that the return is incorrect. That cross examination is not given as a matter of right, and it is discretionary power. The Respondent relied on the case of **Nyoro Construction Company Limited...Vs... Prashnth Projects Ltd & Another (2015) ekr**. It was further submitted that the Defendant knew all along of the existence of the suit but ignored the proceedings and when she was served with the Judgment, she suddenly woke up from deep slumber and filed a similar suit which is an abuse of the Court process.

On jurisdiction it was submitted that the Chief Justice **Willy Mutunga (as he then was)** issued practice Directions vide Gazette **Notice No. 5178 on 25th July 2014** and directed that ;

“ Magistrates Courts shall continue to hear and determine all cases relating to the Environment and the use and occupation of and title to land(whether pending or new) in which the Courts have the requisite jurisdiction .

That the value of the suit property is less than **Kshs. 5 million** and hence it is clear that the Court had the requisite pecuniary jurisdiction to deal with the matter. Further that the issue of jurisdiction does not arise as it was not possible for the Plaintiff (Respondent) to file the case in the Environment & Land Court even before the inaugural Judges of the Court were appointed as the Respondent merely exercised his right of access to justice.

That the inordinate delay cannot be explained away by lack of knowledge of proper procedure or ignorance as the Defendant was not acting in person but instead was represented throughout. That the Decree was issued on **11th October 2013**, and served upon the Defendant and in total disregard of procedure, the Appellant filed a suit in the Environment and Land Court at Milimani. Further that the Respondents have demonstrated that the trial Court had jurisdiction to entertain the matter, the Appellant was served and therefore default Judgment entered was regular and the Appellant's case is riddled with delay.

The Court has considered the Grounds of Appeal as well as submissions by counsels and the authorities cited. Being a first appeal, it is the Court's duty to analyze and re-assess the evidence on record and reach its own conclusions. **In Selle -vs- Associated Motor Boat Co. [1968] EA 123, it was expressed:**

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”

The Court having carefully read and considered the written submissions, the record of Appeal, the grounds thereof and the Judgment by the trial Court and finds that the issues for determination are;

1. Whether the Magistrates Court had Jurisdiction to hear and determine the matter.

2. Whether the Appel is merited

1. Whether the Magistrates Court had Jurisdiction to hear and determine the matter.

It is not in doubt that jurisdiction is everything and without jurisdiction the Court has no option but to down its tools. It has been held by several courts that an issue of jurisdiction can be raised at any point even for the first time on Appeal. See the case of **Kenya Ports**

Authority ...vs... Modern Holdings [E.A] Limited [2017] Eklr, where the Court held that ;

This Court in the case of Adero & Another ...Vs.. Ulinzi Sacco Society Limited [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;

“1.....

2. The jurisdiction either exists or does not ab initio and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.

6.

7.” (Our emphasis).

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself

- provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

The suit at the trial Court was filed on **9th May 2012** as evidenced by the proceedings . The Appellant has submitted that the law that was applicable at the time of the filing of the suit by the Respondent was the **Land Registration Act 2012**, which defined the Court to mean the Environment & Land Court established under the **Environment & Land Court Act 2011**, and as the suit was filed on **9th May 2012**, the Court that had jurisdiction was the Environment & Land Court. The Respondent in his submissions has acknowledged that the Chief Magistrates Court had no jurisdiction. However, the

Chief Justice Willy Mutunga, finally calmed the waters when he issued Practice Directions **vide Gazette Notice No. 5178** and the Respondent submitted that the said Directions then empowered the Court to hear and determine the matter.

A Court’s jurisdiction flows from either the Constitution or the statute. It is trite that a Court cannot arrogate itself Jurisdiction nor can the parties or anyone else arrogate it Jurisdiction which it does not have. See the Case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another** (supra) the Court stated;

“[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.”

*The Respondent has acknowledged that at the time of filing the suit, the Court did not have jurisdiction. The Respondent has further contended that the Court then acquired its jurisdiction as per the **Practice Directions** granted by the **Hon. Chief Justice**. However, as noted above, the Practice Directions are only but Directions and are not an Act of Parliament. It is thus not in doubt that Jurisdiction could only flow from the Constitution and or statute and the said Jurisdiction cannot stem from elsewhere. See the case of **John K. MalembiVs... Trufosa Cheredi Mudembei & 2 others** [2019] eKLR where the Court of Appeal held that ;*

39. On perusal of the record, it is clear that as at the time when the Gazette Notice was published, the suit was part heard. Therefore the practice directions purported to invest the High Court with authority to conduct the matter until its conclusion.

40. The fundamental question to ask is whether practice directions could confer jurisdiction and the answer is an emphatic no. The confusion seems to stem from the words “...as may be directed by the Chief Justice....” The confusion, to our mind, is more apparent than real. The Chief Justice could not direct that the High Court exercise a jurisdiction it did not have. All that the transitional clause did was allow him to direct otherwise than the continued hearing of the matters pending in the hiatus between the promulgation of the Constitution and the coming into operation of the Environment and Land Court. That direction could foreseeably take the form of some or all of the cases being held in abeyance until that Court was operationalized. Once it was operational, however, the Chief Justice had no further role.

*41. It has long been established that jurisdiction is everything and without it the Court must down its tools otherwise everything after that becomes a nullity. Nyarandi, J famously made the point in **OWNERS OF THE MOTOR VESSES “LILLIANS” V CALTEX OIL (KENYA) LTD** (Supra);”*

“A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

42. For the foregoing reasons, we find that the learned judge misdirected himself on issue of jurisdiction. We hereby set aside in entirety the judgment of the High Court delivered on 17/11/2015 in Eldoret HCCC NO. 248 of 2000. We direct the suit between the parties be and is hereby transferred to the Environment and Land Court which has jurisdiction to hear and determine the matter. Each party to bear his/its own costs.

From the foregoing, this Court finds and holds that as the suit was filed **on 9th May 2012**, heard and a determination made in **2013**, the Court that was vested with the requisite jurisdiction to hear and determine the matter was the Environment & Land Court. The Magistrates Court specifically the Senior Principal Magistrate Court was not clothed with the requisite jurisdiction to hear and determine the matter and thus the said proceedings and the Judgment rendered and subsequent orders are null and void ab initio.

3. Whether the Appeal is merited

The Appellant has sought for the setting aside of the Ruling and subsequent orders of the trial Court dated **15th September 2020**. The said Ruling had dismissed the Appellant's Application dated **1st September 2020**, seeking to set aside the orders of the Court and the Ex parte Judgment and allow the Appellant to file her Defence. The Court having held that the trial Court did not have jurisdiction and the Judgment and subsequent orders of the Court are **null and void ab initio**. It then follows that the Appeal is merited. The Court finds and holds that the trial Court did not have jurisdiction to hear and determine the matter. Consequently the Judgmental and subsequent Orders are set aside and the suit is struck out for want of jurisdiction.

The Upshot of the foregoing is that the Court finds the Appeal merited in so far as the trial Court did not have jurisdiction to hear and determine the matter. Consequently the suit at the lower Court is struck out for want of jurisdiction.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 8TH DAY OF OCTOBER, 2021.

L. GACHERU

JUDGE

Court Assistant – Lucy