



**Imani v Sutaria (Civil Appeal E058 of 2019) [2023] KEHC 21081 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21081 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL E058 OF 2019**

**DKN MAGARE, J**

**JULY 6, 2023**

**BETWEEN**

**YUSUF NOORALI IMANI ..... APPELLANT**

**AND**

**SANJAY SUTARIA ..... RESPONDENT**

**JUDGMENT**

1. This matter came before me for judgement. Parties confirmed to me that it is a commercial dispute. This is an appeal from the decision of the chief magistrate’s court at Mombasa in CMCC 1219 of 2017.
2. The Memorandum of Appeal has 6 grounds. They were in a nutshell on the following issues: -
  - a. The court condemned the Appellant unheard.
  - b. The respondent failed to demonstrate how rent arrears of 605,000/= arose and the Appellant was not in occupation since August 2016.
  - c. There was no evidence of increase of rent from 25,000/= to 35,000/=
  - d. There were no account on the auction proceeds.
3. Though couched as a commercial dispute, the main issue was the steps taken to increase rent over some premises, when vacant possession was given. The so-called proceeds of the auction are as a result of distress for rent. The legality of this distress for rent is the main issue.
4. The rent issue was in arrears of 605,000/= in Mombasa/Block XIX/89/M1. The claim for rent over land is not a commercial dispute. This is in particular the issue of increase of rent. In *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another* [2016] eKLR,

“Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of



the contract. This test accords with what other Courts have done and therefore lends predictability to the issue."

5. In *Mohamed Ali Baadi and others v Attorney General & 11 others* [2018] eKLR, the court stated as doth: -

"The Supreme Court in *Republic vs Karisa Chengo & 2 Others* amplified and pertinently held that each of the Superior Courts established by or under the Constitution has jurisdiction only over matters exclusively reserved to it by the Constitution or by a statute as permitted by the Constitution. The holding in this case however, does not resolve the knotted question of which court among the High Court and the two equal status Courts under Article 162(2)(b) should be seized of jurisdiction in controversies in hybrid cases. Hybrid cases are cases where issues cut across the exclusive jurisdiction reserved for each of the three courts. As demonstrated by the issues identified above, this is one such hybrid case

6. The court continued that in cases of maze issues or denial of rights, then the high court has jurisdiction as well as the courts of equal status, the court stated:-

"After a wide-ranging analysis and consideration of the applicable provisions of the Constitution and in particular, Articles 165(3), 162(2) and (3), and section 13 of the *Environment and Land Court Act*, and the amendments thereto, the five Judge Bench of the High Court held as follows: -

In its strict sense the "jurisdiction" of a Court refers to the matters the Court as an organ not an individual was competent to deal with and reliefs it was capable of granting. Courts were competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowered them to deal with. Such jurisdiction could be limited expressly or impliedly by the instrument creating the Court.

The jurisdiction of the High Court was unlimited save only as provided by the Constitution. The High Court had express jurisdiction to deal with and determine matters of a Constitutional nature under article 165(3) of the Constitution. Indeed, while the Constitutional claw back was found under article 165(5), article 165(3) (e) of the Constitution further confirmed that the High Court's jurisdiction could be extended further pursuant to any statutory provision. For example, the *Judicature Act* which conferred the specialized admiralty jurisdiction. The Constitution however did not provide for any other written law to limit the jurisdiction of the High Court.

Both the High Court and the ELC Court had a concurrent and or coordinate jurisdiction and could determine Constitutional matters when raised and do touch on the environment and land. Neither the Constitution nor the ELC Act limited the High Court's jurisdiction in that respect ....

A closer reading of the Petition especially the complaints and the reliefs sought revealed that the petition was simply not about the environment and land. Substantial questions had been raised not only on the process of compulsory acquisition of land but also on the integration and generation of the environment. Questions had been raised about denial of access to information as well as a threatened contravention or violation of the right to fair administrative action. Questions had also been raised on the violation and or further threatened violation of the dignity of the petitioner's constituents.



7. Jurisdiction is the authority to decide therefore, where the Court has jurisdiction it must take jurisdiction while where it has no jurisdiction it must down its tools. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA (as then he was) stated as doth: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of 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 the kind and nature of the actions and matters of which the particular court has cognisance, 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 judgement is given”

8. The Supreme Court has had an opportunity on numerous occasions and it has never squandered such to clarify the extent of jurisdiction of this Court and Courts of equal status. In *Republic v Karisa Chengo & 2 others* [2017] eKLR, the supreme court posited as doth: -

“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).”

9. In Re-Interim Election Commission Petition No. 2 of 2011, the Supreme Court rendered itself as doth: -

Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):



“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.

10. The supreme court succinctly continued to require, nay demand that the constitution be interpreted in a manner that promotes the rule of law and holistic interpretation of the constitution. In the case of *in the Matter of Interim Independent Electoral Commission* [2011] eKLR. The supreme court posited as doth: -

“In common with other final Courts in The Commonwealth, Kenya’s Supreme Court is not bound by its decisions, even though we must remain alive to the need for certainty in the law. The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

11. In *S.K Macharia V KCB*, the Supreme Court, the Court was particular that there must be jurisdiction and the same cannot be conferred by consent by connivance or by craft. The Court was precise and held as doth: -

“As held in the matter of Advisory opinion of the Court under Article 163 of the Constitutional Petition No. 2 of 2011 at para 30, the Court stated, “A Court may not arrogate itself jurisdiction through craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where legislation is clear and there is no ambiguity.”

12. On the other hand, also the Court cannot by sheer laziness or dislike for a file divest itself of jurisdiction that it has. In support of that contention, Justice Nyarangi quoted in *Motor Vessel Lilian S.* (supra) Justice Nyarangi JA laid with approval words and phrases legally defined – Vol 3: I to N page 113.

“By Jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognisance of 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 which jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction is 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 the power to determine conclusively whether the facts exist. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing jurisdiction must be acquired before judgment is given.”

13. This is a dispute not on commercial transaction but increase in rent and the attendant arrears. The commercial dispute is a small proportion. The issue of rent is in a domain of a different court.
14. Section of the Environment and Land Court provides as follows: -

“ 13. Jurisdiction of the Court

- (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.

15. Distress for rent and claim for rent arrears are within the domain of the Environment and Land Court. The plaint filed on August 22, 2016 sets out what prayers parties wanted. There are aspects of commercial dispute, but they are not predominant. I therefore transfer the appeal to the Environment and Land court for hearing and disposal.

**DELIVERED, DATED and SIGNED at MOMBASA** on this 6<sup>th</sup> day of **July 2023**. Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

No appearance for parties.

Court Assistant Brian

