



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kangaru v Wanjau (Civil Appeal E009 of 2023)  
[2023] KEHC 20512 (KLR) (21 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20512 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E009 OF 2023  
LM NJUGUNA, J  
JULY 21, 2023**

**BETWEEN**

**JOHN MAINA KANGARU ..... APPELLANT**

**AND**

**KIAI WANJAU ..... RESPONDENT**

**JUDGMENT**

1. The appeal herein arose from the ruling of Hon Ishmael S.I delivered on January 17, 2023, in Small Claims Court civil case No 079 of 2022 at Nyeri. Being dissatisfied with the said ruling, the appellant filed the appeal herein in which he listed six (6) grounds of appeal as enumerated on the face of the memorandum of appeal dated February 10, 2023.
2. Reasons wherefore the appellant herein prayed for orders that:
  - i. The appeal be allowed.
  - ii. The statement of claim be reinstated.
  - iii. Costs of the appeal.
3. The cause of action was premised on the allegation that the respondent maliciously caused fire that spread to the appellant's parcel of land damaging extensively 28 mature coffee bushes, 5 young gravellia, 1 young macadamia, 17 mature eucalyptus, 8 young eucalyptus and 1 loquat tree. That the matter was reported at Kaimachimbi Police Station with OB reference number being 02/21/03/2022 and wherein the total value of the trees that were allegedly damaged amounted to Kes 99,754/=. The respondent opposed the claim via a preliminary objection citing reasons *inter alia* that the Small Claims Court was bereft of jurisdiction to determine the matter herein as the claim was couched in a manner that was more of criminal in nature than tort. The trial court upon considering the preliminary objection by the respondent entered a determination via a ruling dated January 17, 2023 in which the



preliminary objection was upheld thus striking out the claim with no order as to costs. The appellant being aggrieved by the decision of the trial court filed the appeal herein.

4. The appeal proceeded by way of written submissions and wherein the appellant submitted that his claim before the trial court was for compensation for the loss suffered as a result of the fire caused by the respondent which loss amounted to a total of Kes 99,754/= and therefore it is wrong that the respondent instead of considering the loss and the amount owed, chose to dwell on the word 'malicious' thus misdirecting himself and hence the court as to the cause of action. Reference was made to section 12 of the [Small Claims Court Act](#) to which therein lies the jurisdiction of the said court. Further, it was contended that the preliminary objection did not specifically point to the provisions that the statement of claim offended and therefore, the trial adjudicator erred in upholding the preliminary objection raised by the respondent.
5. The appellant defended his claim that indeed the claim was filed in the right court for this was a wrongful act or omission that injured or interfered with the appellant's property and as such, malicious damage could be categorized as tort as rightly pleaded herein. This court was therefore urged to allow the appeal herein and thereafter reinstate the claim for hearing.
6. The respondent submitted that the main issue for this court's determination is whether the appeal herein is meritorious. That in addressing the issue of the merit, a determination has to be made on whether the Small Claims Court had jurisdiction to hear the nature of the claim as was set out by the claimant/appellant. The respondent reiterated that section 13 (5) of the [Small Claims Court Act](#) provides that a claim shall not be brought before the court if the cause of action is founded upon defamation, libel, slander, malicious prosecution or is upon a dispute over a title to or possession of land, or employment and labour relations.
7. Further, that the court has jurisdiction to determine any civil matter relating to a contract for sale and supply of goods and services, a contract relating to money held and received, liability in tort in respect of loss or damage caused to any property or for delivery or recovery of movable property, compensation for personal injuries and set off and counter claim under any contract. That in reference to the claim herein, the appellant couched his claim to impute criminal liability on the respondent in destroying his trees and vegetation. Reliance was placed on the cases of [Owners of the Motor Vessel 'Lillian S' v Caltex Oil \(Kenya\) Ltd](#) [1989] and [Equity Bank Limited v Bruce Mutuku t/a Diana Tour Travel](#) [2016] eKLR. That the appellant filed the claim in a court that is bereft of jurisdiction and therefore the appeal must fail for a court must always operate within its form and substance in entertaining suits before it.
8. The court has considered the grounds of appeal and the submissions by the parties and it forms the view that the main issue for determination is whether the appeal has merits.
9. As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The court has however to bear in mind that it did not have an opportunity to see and hear the witnesses first hand. This duty is captured by section 78 of the [Civil Procedure Act](#) which espouses the role of a first appellate court which is to:  
  
'..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.'
10. This was buttressed by the Court of Appeal in the case of [Peter M. Kariuki v Attorney General](#) [2014] eKLR where it was held that:

“We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions



and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.....” (See *Ansazi Gambo Tinga & another v Nicholas Patrice Tabuche* [2019] eKLR).

11. A useful starting point in addressing the core issue raised in the appeal herein is to determine whether the trial court had the power conferred upon it to hear the claim herein. Generally, jurisdiction is the very basis on which any tribunal or court tries a case; it is the lifeline of all trials. In other words, a trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to the court; *a fortiori* the court can *suo motu* raise it.
12. By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance 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 like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.
13. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. [See Supreme Court *in the matter of the Interim Independent Electoral Commission*, constitutional application No 2 of 2011 (unreported); also *Republic v Magistrates Court, Mombasa; Absin Synegy Limited (interested party)* judicial review E033 of 2021 [2022] KEHC 10 (KLR)].
14. In the case herein, the appellant submitted that the claim was filed in court with the right jurisdiction for this was a wrongful act or omission that injured or interfered with the appellant’s property and as such, malicious damage could be categorized – as in the case herein - as a tort under section 12 (1) (c) of the *Small Claims Court’s Act* while the respondent on the other hand contended that in reference to the claim herein, the appellant couched his claim to impute criminal liability on the respondent in destroying his trees and vegetation and therefore, the same could not be entertained by the trial court.
15. The jurisdiction of the *Small Claims Court Act* is provided for under section 12 of the said Act. It states that:

Nature of claims and pecuniary jurisdiction:

1. Nature of claims and pecuniary jurisdiction to determine any civil claim relating to:
  - a. A contract for sale and supply of goods or services;
  - b. A contract relating to money held and received;
  - c. Liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
  - d. Compensation for personal injuries ; and
  - e. Set off and counterclaim under any contract.
2. Without prejudice to the generality of sub section (1), the court may exercise any other civil jurisdiction as may be conferred under any other written law.
3. The pecuniary jurisdiction of the court shall be limited to one million shilling.
4. ....



16. In determining whether the appellant herein had a recourse before the trial court, I have independently rehashed the claimant’s claim as was stated on the claim and the same was to the effect that;  
...‘That in the month of March 2022, the respondent without respect and with intent to damage the property of the claimant maliciously lit fire that spread to the claimant’s aforementioned parcel of land .....
17. The offence of malicious damage to property is found in section 339(1) of the Penal Code which provides :  
“Any person who willfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanor, and is liable, if no other punishment is provided, to imprisonment for five years.”
18. The words willfully and unlawfully as used in section 339 (1) of the Penal Code portend that the destruction or damage of the identified property was wanton and without any color of right or authority.
19. From the above, the claimant based his claim on malicious destruction of his property leading to a loss quantified at Kes 99,775/=. The argument by the respondent of which this court equally concurs with, that if the appellant is imputing criminality on the part of the respondent in destroying his property, the opportunity to have the claim within the jurisdiction of the trial court was lost.
20. It is apparent that the claimant herein had reported the matter at Kaimachimbi Police Station under OB reference Number 02/21/03/2022 signifying the fact that he had started criminal proceedings against the respondent but later withdrew the same as the two chose to engage in mediation. That notwithstanding, the best that the complainant could have done, in my view, was to enforce the said alleged agreement signed by the two and not the claim as narrated for the same in my view imputed a criminal liability.
21. Therefore, the upshot of the judgment herein is that:  
i. The appeal herein has no merits and it is hereby dismissed.  
ii. No order as to costs.
22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 21ST DAY OF JULY, 2023.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent

