



**M’Kirichu v Thurania & another (Civil Appeal E015 of 2023)
[2024] KEHC 15878 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15878 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E015 OF 2023
EM MURIITHI, J
DECEMBER 17, 2024**

BETWEEN

M’IKIRIMA M’KIRICHU APPELLANT

AND

SAMSON THURANIRA 1ST RESPONDENT

JAPHETH KOBIAH MARANYA 2ND RESPONDENT

*(Being an appeal from the Judgment and decree of the Hon. D.W
Nyambu (CM) delivered on 21/12/2022 in Meru CMCC No. 349 of 2015)*

JUDGMENT

1. By a plaint dated 10/11/2015, the Appellant sued the Respondents seeking an order directing the 2nd Defendant to transfer L.R NO. NYAKI/MUNITHU/2718 to the Appellant and in default the Executive Officer of the Court to be empowered to effect the transfer and costs of the suit. He pleaded that at all material time relevant to this suit, he was the registered owner with absolute proprietorship interest in L.R NO. NYAKI/MUNITHU/2718 measuring approximately 1.30 Ha (3.21 acres) (hereinafter referred to as the suit land). The ownership of the suit land was on 19/8/2014 transferred to the 1st Respondent in extremely unclear circumstances and without his consent or approval. The 1st Respondent then caused the suit land to be transferred to the 2nd Respondent and a title deed was issued to that effect. All the transactions and/or dealings in the suit land commencing with the transfer to the 1st Respondent and the subsequent transfer to the 2nd Respondent were characterized by fraud, hence illegal, null and void. His claim against the Respondents is for an order directing the reversion of the suit land to him on account of the incidence of fraud and illegality. He has expressly demanded a retransfer of the suit land to his name from the Respondents to no avail.
2. The Respondents denied the claim by their separate statements of defence dated 8/12/2015 and 4/4/2016 and prayed for the Appellant’s suit to be dismissed.



3. In dismissing the Appellant's suit, the trial court encapsulated that;

“The 1st defendant transferred the property to the 2nd defendant for value. As an absolute proprietor of the land, he had all rights to sell the land to the 2nd defendant. The 2nd defendants testified that he conducted due diligence prior to purchase of the land. The 2nd defendant has been in occupation of the suit land since he purchased it. The plaintiff failed to prove his case on a balance of probabilities. In sum, I find that the plaintiff failed to prove his case against the defendants on a balance of probabilities. I therefore dismiss this suit with costs to the defendants.”

The Appeal

4. On appeal, the Appellants filed his memorandum of appeal on 20/1/2023 raising 9 grounds as follows:

1. The learned trial magistrate erred in law and fact in holding that the Appellant never proved their claim of fraud on a balance of probabilities.
2. The learned trial magistrate erred in law and facts in holding that the Appellant did not specifically prove the allegations of fraud.
3. The learned trial magistrate erred in law and facts by failing to appreciate that the Appellant proved the particulars of fraud through the standard of proof that is more than a mere balance of probabilities but lower than beyond reasonable doubt.
4. The learned trial magistrate erred in law and facts in holding she was not satisfied that the transfer of the property L.R No. Nyaki/Munithu/2718 from the Appellant to the 1st Defendant was illegal.
5. The learned trial magistrate erred in law and facts by failing to appreciate that the transfer and registration of L.R No. Nayki/Munithu/2718 effected on the 29th August 2014 was illegal and should be cancelled.
6. The learned trial magistrate erred in law and facts by failing to appreciate that the 2nd Defendant was not an innocent purchaser and does not hold a good title of the property L.R No. Nyaki/Munithu/2718.
7. The learned trial magistrate erred in law and facts by failing to have regard to the Appellant's evidence and documents filed in support of the suit.
8. The learned trial magistrate erred in law and facts by relying on conjecture and speculations in her findings.
9. The learned trial magistrate findings are against the weight of the evidence and the law.

Duty of the Court

5. This being a first appeal, this court is duty bound to delve at some length into factual details and revisit the facts as presented in the trial court, analyse the same and arrive at its own independent conclusions, but always remembering that, the trial court had the advantage of seeing the witnesses testify. (See *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123).
6. Before delving into issues raised herein, the court must satisfy itself in limine that it is clothed with the requisite jurisdiction to determine the appeal, because without jurisdiction, it would be pointless to go into the merits of the appeal. When issue was raised by the Court (Omido, J. during service-



week hearings), the learned Counsel for the appellant is shown on record to have submitted that: “Muriithi, J. addressed the issue and said the High Court can handle the appeal” and the Judge consequently directed that: “The matter to be place before Muriithi, J. for mention on 4/11/2024 for directions.” When the matter came before me, Judgment was set for 17/12/2024, counsel only confirming that submissions had been filed. NO question of jurisdiction was taken by oral submissions on that occasion.

7. Having considered the proceedings of this court in this file, it is noted that tis Court has not ever considered and ruled on the question of the jurisdiction of the court as stated. In its only ruling in the matter delivered on 26/6/2023, the Court had only considered whether an order for stay of execution of the trial court’s order could be granted in the circumstances of the case. The ruling of the court is set out in full as follows:

“ Republic Of Kenya

In The High Court Of Kenya At Meru

Civil Appeal No. E015 Of 2023

M’ikirima M’ikirichu.....applicant

Versus

Samson Thurania.....1st Respondent

Japheth Kobiah Maranya.....2nd Respondent

Ruling

1. By a Notice of Motion under certificate of urgency dated 7/3/2023, brought under Order 9 Rule 9 and Order 51 Rule 1 of the Civil Procedure Rules, Sections 3, 3A, 79G and 95 of the Civil Procedure Act, and any other enabling provisions of the law, the Applicant seeks that:
 1. Spent
 2. The Honorable Court be pleased to grant stay of execution of the Judgment and orders given on 21st December 2022 in Meru Chief Magistrate Court, civil suit No. 349 of 2015 pending hearing and determination of this application.
 3. The Honorable Court be pleased to grant stay of execution of the Judgment and orders given on 21st December 2022 in Meru Chief Magistrate Court, civil suit No. 349 of 2015 pending hearing and determination of the Appeal.
 4. The costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of M’Ikirima M’Ikirichu, the Applicant herein, sworn on even date. He avers that unless the orders sought are granted, his arguable appeal which has high chances of success will be rendered ineffectual and nugatory.
3. The 1st Respondent did not file any response to the application.



4. The 2nd Respondent has opposed the application vide grounds of opposition filed on 18/4/2023 that, “The application is a non-starter in view of the fact that an order of execution cannot issue against a dismissal order; The judgment in Meru Chief Magistrate Court Civil Suit No. 349 of 2015 dismissed the Appellant’s suit and did not issue any positive order capable of execution; Otherwise the application is an abuse of the process of this Honorable Court and should be dismissed with costs.”

Analysis and Determination

5. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in Kenya Shell Limited v Kibiru Another (1986) eKLR as follows: -

“....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

6. It is generally accepted that where there is no positive order capable of being executed, a stay of execution ought not to be issued. As this court said in Trident Insurance Company v Dennis Mutwiri [2021] eKLR, “there is in legal acceptation of the term nothing to stay in a negative order which does not compel or require the doing or the taking of any action.”
7. The Court of Appeal in AG v James Hoseah Gitau Mwara [2014] eKLR remarked that in order for a Court to exercise its discretion to grant stay, it must ask itself the question whether there is anything capable of being stayed in the impugned ruling or decision.
8. In dismissing the Appellant’s case, the trial court rendered thus, “The plaintiff failed to prove his case on a balance of probabilities. In sum, I find that the plaintiff failed to prove his case against the defendants on a balance of probabilities. I therefore dismiss this suit with costs to the defendants.” That is the decision sought to be stayed by the Appellant pending his intended appeal, which is said to be arguable with high chances of success.
9. This court finds that the order of the trial court was a negative one incapable of being executed and, therefore, there is nothing to stay.

Orders

10. Accordingly, for the reasons set out above, the Appellant’s application dated 7/3/2023 is dismissed with costs to the 2nd Respondent.

Order accordingly.

Dated And Delivered This 26Th Day Of June, 2023.

Edward M. Muriithi



Judge”

8. In the locus classicus of Owner of the Motor Vessel “Lilian S” Vs Caltex Oil (Kenya) Limited (1989) KLR 1, Nyarangi J sitting in the Court of Appeal held as follows:

“...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 continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter the moment it holds the opinion that 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 judgment is given.”

9. A court’s jurisdiction flows from either *the Constitution* or the legislation or both. As counselled by the Supreme Court of Kenya in *Macharia & another v Kenya Commercial Bank Limited & 2 others* (Application 2 of 2011) [2012] KESC 8 (KLR) (23 October 2012) (Ruling), thus:

“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. We agree with Counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”

10. Article 165 (3) of *the Constitution* confers this court with jurisdiction in exhaustive terms as follows:

“Subject to clause (5), the High Court shall have- a) Unlimited original jurisdiction in criminal and civil matters; b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144; (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of— (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191; and (e) any other jurisdiction, original or appellate, conferred on it by legislation.”

11. It is instructive to note that the jurisdiction of this court is subject to Article 165 (5) of *the Constitution* which provides as follows:

“The High Court shall not have jurisdiction in respect of matters:- a) 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).”

12. Pursuant to Article 162 (2) of *the Constitution*, section 13 of the *Environment and Land Court Act* bestows that court with jurisdiction to hear and determine disputes -



- a) Relating to environment planning and protection, climate issues, land use plannings, 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, chooses in action or other instruments granting any enforceable interests in land; and
 - e) Any other dispute relating to environment and land.
13. The Appellant's appeal is hinged on ownership of suit land and alleged illegal and fraudulent transfer thereof to the Respondents. Those are issues within the exclusive jurisdiction of the Environment and Land Court, not this court. The Appellant ought to have moved the Environment and Land Court for the appropriate reliefs.
14. This court finds that it does not have the jurisdiction to hear and determine this appeal. It will, consequently, down its tools.

Orders

15. Accordingly, for the reasons set out above, the Appellant's appeal is struck out for being incompetent and improperly before this court.
16. The appellant shall pay the costs of the appeal to the 2nd Respondent.

Order accordingly.

DATED AND DELIVERED ON THIS 17TH DAY OF DECEMBER 2024.

EDWARD M. MURIITHI

JUDGE

Appearances

Ms. Mugo for the Appellant.

Mr. E. Kimathi for the 1st respondent.

Mr. K. Mwiti for the 2nd respondent.

