Syrup Distributors Ltd v Loki Developers Ltd (Civil Appeal 104 of 2019) [2025] KECA 1589 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1589 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 104 OF 2019

SG KAIRU, P NYAMWEYA & LA ACHODE, JJA

OCTOBER 3, 2025

BETWEEN

SYRUP DISTRIBUTORS LTD ..... APPELLANT

AND

LOKI DEVELOPERS LTD ..... RESPONDENT

(An appeal from the Judgment and Decree of the High Court at Nairobi (L.Njuguna J.) delivered on 3rd November 2017 in Nairobi High Court Civil Appeal No. 166 of 2008)

JUDGMENT

1. Syrup Distributors Limited, the appellant herein, is aggrieved by the decision made by the High Court of Kenya at Nairobi (L. Njuguna J.) in a judgment delivered on 3rd November 2017 in Nairobi High Court Civil Appeal No. 166 of 2008 dismissing its first appeal against a ruling delivered on 19th July 2006 by the Senior Resident Magistrate's Court at Nairobi (Hon. E. C. Cherono). This is therefore a second appeal by the appellant, and our duty in this respect was reiterated and set out in Kenya Breweries Ltd vs Godfrey Odoyo [2010] eKLR as follows:

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni Acting JA (as he then was) said at page 366:-
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> "We would agree with the view expressed in the English case of Martin vs Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed

findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

2. During the hearing of the appeal on 8th October 2024 on this Court's virtual platform, learned counsel Mr. Evans Gaturu appeared for the appellant while Mr. Ezekiel Munyua appeared for the respondent, and both counsel highlighted their respective written submissions dated 30th September 2024 and 22nd January 2020.

3. It is prudent that we commence by providing a brief context to the appeal. Loki Developers Ltd filed an application in Nairobi Chief Magistrates Court Civil Case No. 12932 of 2005 (hereinafter "the trial Court"), which was allowed in a ruling delivered by Hon. E. C.Cherono on 19th July 2006, in which the learned Magistrate gave the following orders:

> "1. That the defendants/respondent whether by itself, its agents, servants, directors and/or employees to deliver immediate vacant possession of all that piece of land in Nairobi area known as LR No.17870, the property of the plaintiff/applicant. Failing which, the plaintiff/applicant to be at liberty to forcefully evict the defendant/respondent from the suit and the O.C.S Kinyago Police Station in Dandora Estate to supervise such eviction to ensure peace and order is maintained.
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> 2. That the defendant/respondent to bring down and remove all the illegal structures in the suit premises and remove the debris thereof , failure to which, the plaintiff/applicant be at liberty to remove such debris at the defendants costs and the OCS Kinyango police station in Dandora Estate to supervise the demolition to ensure peace and security is maintained."

4. Being aggrieved, the appellant filed its first appeal in the High Court, in which the issues were summarised by the said Court as being the jurisdiction of the trial Court to hear the respondent's suit; non- service of summons on the appellant; and the respondent's suit being filed outside the limitation period. After considering the submissions by the parties thereon, the High Court dismissed the appeal after finding that the suit in the trial court was based on trespass and not on the ownership of the suit property, which was in any event not contested, the trial court had jurisdiction. On the issue of service on the appellant of summons to enter appearance, the High Court noted that this was not raised in the trial Court at the earliest opportunity and only appeared in the appeal, and that it would not be appropriate to annul the entire proceedings since the appellant had not shown the prejudice it was likely to suffer. Lastly on the issue of the limitation, it was found that the allegations that the suit was brought after over 12 years was not substantiated by the appellant, while the respondent was categorical that the appellant encroached on the suit property in the year 2005 and the suit was filed in the year 2006. In addition, the issue was not raised in the trial court and only appeared in the appeal.

5. Turning to the present appeal, two preliminary issues have been raised by the respondent in its submissions as regards the competency of the appellant's appeal in this Court. Firstly, contrary to Rule 86 (1) of the Court of Appeal Rules the grounds of appeal set out by the appellant are presented in a narrative and argumentative form which is only suitable for submissions, and are indeed repeated in the same manner in the submissions. While citing the decision of this Court in IEBC and Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR, the respondent submitted that the grounds of appeal were therefore unintelligible. Secondly, the grounds of appeal are not fit for a second appeal in which the Court confines itself to matters of law, as it is apparent that they are based on matters of fact, namely, missing pages in the judgment delivered by the trial court, the ownership of the suit property, the non-service of the summons of appearance, and the suit as originally instituted was barred by limitation of action.

6. As we indicated earlier, a substantial part of the submissions filed by the learned counsel for the appellant was a reproduction of the grounds of appeal set out in the Memorandum of Appeal as follows:

    1. That The Learned Trial Judge Erred in Law in Affirming the Ruling of the Hon. E. C. Cherono Senior Resident Magistrate Delivered on 9th July 2006, when It was Incomplete and had more than Five (5) Pages missing from Page 26 to Page 31, and therefore, Her Judgment of 3rd November 2017 is based on an Incomplete Ruling which was bad in Law and Completely Unjust, and should be Quashed and Set Aside.

    2. That The Learned Trial Judge Erred in Law, in Holding that the Learned Trial Senior Resident Magistrate had Power and/or Jurisdiction, to Hear and Determine a Dispute on a Title Registered Under the Provisions of the Registration of Titles Act Cap 281, of the Laws of Kenya, wherein the Definition of "Court" under Section 2 thereof, means "High Court," and not Otherwise.

    3. That The Learned Trial Judge also fell into an Error in holding that the Ownership of the Suit Property was not Contested, while It was clear that LR. 17870 belonged to the "Kenya Railways Corporation," which was not a Party to the Suit, while admitting that the Last time Agreement was entered into was in 1996 with the Kenya Railways, and then, in the Same Breath, holding that the Appellant first Encroached onto the Suit Land Parcel in 2005, as alleged by the Respondent, who later on Filed Suit for Trespass in 2006, which was Contrary to the Judge's finding, that the Appellant had been on the Land as far back as 1996, more than Nine (9) Years Earlier thus Occasioning a Miscarriage of Justice since Limitation in Tort is only Three (3)Years.

    4. That The Learned Trial Judge also Erred in Law in Holding that Appellant having not been Served with Summons to Enter an Appearance in 2006, when the Interlocutory Application was Filed and Argued, and an Order for Eviction of the Appellant made on 9th July 2006, before the Appellant was Served with Summons to Enter an Appearance as Required by the Provisions of Order V Rule I which Provides, that "when a Suit has been Filed, a Summons shall Issue to the Defendant, Ordering him to appear within the time Specified therein, and the Summons shall be Sealed with the Seal of the Court, not more than Thirty (30) Days after They are Issued and shall be accompanied by a Copy of the Plaint and the Summons shall be Collected for Service within Thirty (30) Days of Issue or Notification, whichever is Later failing which; the Suit shall abate," and relied on an Incomplete Ruling of 9th July 2006 to that effect, which had not addressed all the Legal Points Favourable to the Appellant due to Bias on the Part of the Trial Magistrate.

    5. That The Learned Trial Judge Erred in Law, in Holding that the Issue of a Suit for Trespass was brought Twelve (12) Years, Nine (9) Months and Thirteen (13) Days out of the Limitations of Three (3)Years, was not Substantiated in the Appellant's Submissions, while the Issue was well Canvassed, both during the Arguments and the Appellant 's Submissions, and the Trial Judge had Observed that the Last Letter that Indicated that the APPELLANT was on the Land was in 1996, through Letter of Allotment from "Kenya Railways Corporation," and went ahead to take Sides, and Accept the Respondent's Averments that the APPELLANT Encroached onto the Land in 2005, and the Respondent Sued Her in 2006, while that was not the Case and thus Visited Injustice on the Appellant, resulting in a Miscarriage of Justice" to the APPELLANT by being Partial, and Denying the Appellant Justice by taking Sides in the Case, and Relying on an Incomplete Ruling of 9th July 2006.

6. That The Learned Trial Judge Erred in Law in agreeing with the RESPONDENT that the mere fact that the Appellant had not shown what Prejudice They stood to Suffer by not being Served with Summons was not Good enough to Annul the entire Process that they had Participated in, while It was a Matter of Law and was Mandatory that Summons to Enter an Appearance be Served within Thirty (30) Days, and It was Obligatory on the Part of the Appearance be Served within Thirty (30) Days, and It was Obligatory on the Part of the Respondent to serve Summons, Failure to which the whole Process was a Nullity and the Suit would abate.

7. That The Learned Trial Judge Erred in Law in that Her Decision was Biased, Prejudiced One-Sided, Unfair and against the Weight of the Evidence and Imported Her Own Hypotheses and Conjectures, and She Introduced Her Own Suppositions, and hypothesis; and the Court failed in doing Justice to the Appellant, and thus Occasioned a Miscarriage of Justice to Her Contrary to the Interests of Justice."

7. It is notable that the issue of the missing pages of the ruling by the trial Court was never raised in the High Court and quite apart from being an issue of fact, is incompetently being raised for the first time on a second appeal. It is also not lost on us that it was the appellant who had the responsibility of providing a complete record of appeal, and cannot now rely on its lapses in the High Court as a ground of appeal in this Court. In addition, the aspects of the appeal relating to the date of encroachment on the respondent's land are matters of fact that can not be the subject of determination at this stage, having been addressed by both the trial Court and High Court, which made concurrent findings of fact on the issue. It is also notable in this respect that the issue of limitation of actions had been the subject of an earlier preliminary objection and ruling by the High Court which was not appealed, as noted by the High Court in its judgment. We again note that the appellant has in this respect provided an incomplete record that leaves out these crucial pleading and ruling that was made by the trial Court.

8. Lastly, the remainder of the appellants submissions dwell on the implications of a judgment delivered by the Environment and Land Court at Nairobi in ELC Suit No. 2191 of 2007 on 24th January 2023, that was neither pleaded in the trial Court or High Court, and which judgment was delivered way after delivery of the judgment of the High Court that is the subject of this appeal, and involved a third party who was not a party to this appeal. These submissions are to this extent therefore not properly before this Court, and cannot be the subject of any determination in this appeal.

9. We will therefore confine ourself to the two findings of law made by the High Court that are properly before us, namely as regards the trial Court's jurisdiction, and the legal effect of the lack of service of the summons to enter appearance on the appellant. The main issue before us is whether there are any grounds to interfere with the exercise of discretion by the learned Judge of the High Court in making the said findings.

10. As regards the trial Court's jurisdiction, the subject of the ruling the appellant is appealing was an application filed by the respondent herein, which was seeking an injunction to restrain the appellant from trespassing on the respondent's land, and eviction of the appellant therefrom. The respondent had in its amended plaint dated 11th January 2006 alleged that it was the registered proprietor of the suit property and that the appellant had encroached and trespassed thereon. The respondent accordingly sought to following orders: an injunction to restrain the appellant, vacant possession, mesne profits, and general damages.

11. The High Court found as follows on the issue of the trial Court's jurisdiction to hear the said application and suit before it:

> "I have considered the record of appeal, the submissions of the (sic) both parties and the authorities cited. It is the nature of the Respondent's suit and the prayers sought therein that will be of consideration in determining the issue of jurisdiction of the lower court to entertain the claim. The subject suit is based on trespass and the ownership of the suit property is not contested. My perusal of the record reveals that there was a preliminary objection on jurisdiction which was heard and a ruling on the same delivered on 14" March, 2006. In the said ruling the trial magistrate found, which holding I fully agree with, that the issue in dispute in this case is a simple common law claim for trespass which can very well be determined by a subordinate court and there is no dispute on ownership or the property."

12. We have already alluded to the fact that the appellant did not avail a copy of the preliminary objection it filed in the trial Court on jurisdiction, or the ruling thereon by the trial Court. It also did not refer to any evidence it availed of the value of the subject property to support its claim on the trial Court's pecuniary jurisdiction. We therefore do not have any material on record to controvert the findings by the High Court, and no ground or basis to set aside the said findings.

13. It is also noteworthy that there had also been a number of legal developments on the jurisdiction of magistrate's courts to hear and determine disputes related to land and new laws were in place by the time the decision of the High Court was delivered, whose effect is to render the issue of jurisdiction moot. In particular, the Environment and Land Court had been enacted and was in force, and section 26 (3) and (4) thereof provides that the Chief Justice can by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country, who shall have jurisdiction to hear and determine matters of a civil nature involving occupation and title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act. Section 9 of the Magistrates Court's Act, which was also in force, additionally provides that a Magistrate's Court shall, in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* and subject to their pecuniary limits, hear and determine claims relating to:

    i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

    ii. compulsory acquisition of land;

    iii. land administration and management;

    iv. public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

    v. environment and land generally.

14. On the findings made by the High Court as regards the legal effect of the lack of service of summons, our understanding of the appellant's submissions is that service of summons is mandatory, failure of which renders the entire proceedings a nullity and the suit to abate. A summons in ordinary usage is a call by an authority to appear at a named place or to attend to a duty. It is defined in Black's Law Dictionary, Ninth Edition as "a writ or process commencing the plaintiff's action and requiring the defendant to appear and answer" and "a notice requiring a person to appear in court as a juror or witness". It is therefore a formal notice informing the recipient that they are being sued and that they must respond to the allegations against them. Order 5 Rule 1 of the Civil Procedure Rules implies

this purpose of a summons, and provides that when a suit has been filed, a summons shall issue to the defendant ordering him to appear within the time specified therein.

15. Therefore, the purpose of a summons is to notify and ensure appearance of a defendant in Court in a suit filed against him or her. The appellant was aware of the suit filed against it in the trial court, as evidenced by its active participation and defence of the application that is the subject of this appeal as demonstrated by the proceedings of the trial Court. We therefore see no illegality in the finding made by the learned Judge of the High Court as regards this purpose of summons, which was backed by the decision in the case of Mafuta Kenya Pipeline Company Limited vs Products Limited [2014] eKLR. It is also noted that the consequences of lack of service of summons proposed by the appellant are not provided for in Order 5 of the Civil Procedure Rules.

16. We accordingly find that this appeal is not merited, and it is hereby dismissed with costs to the respondent.

17. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar.