



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELCA NO. E116 OF 2024

**ZAKAYO MAINGI KANURI
APPELLANT**

- **1ST**

**MARY PRISCILLA WAIRIMU WAMWEA
APPELLANT**

- **2ND**

VS

**RUTH NYAMBURA MUNYUA
RESPONDENT**

- **1ST**

**KELVIN MAINA MUNYUA
RESPONDENT**

- **2ND**

**(Being an appeal against the Ruling and Order issued on
19/7/2024 by HON S A OPANDE PM in CMELC E176 of
2024)**

JUDGEMENT

The introduction and background

1. On 13/5/24, the defendants filed a preliminary objection expressed on the following grounds;

- a. That the trial court lacks pecuniary jurisdiction to hear and determine the instant suit under Section 7 of the Magistrates Act, 2015
 - b. That the value of the subject matter as per the two valuation reports of Syagga & Associates Limited dated 29/11/23 is over Kshs 20 Million, beyond the court's pecuniary jurisdiction.
2. Upon determining the said Preliminary objection, the court in its ruling delivered on 19/7/24 agreed with the objector and struck out the Plaintiffs' suit as well as the application dated 3/5/23 with costs.
3. Aggrieved by the said Ruling, the Plaintiffs, now appellants, filed the current appeal on 11 grounds. Briefly, the appellants' grievances are that the trial court erred in fact and law in:
 - a. Finding that the value of the suit land is beyond the pecuniary jurisdiction of the court.
 - b. Holding that the suit land was not sold at the market price and /or price of the current valuation report, and therefore its value exceeds the pecuniary jurisdiction of the court.
 - c. In entertaining a preliminary objection raised on a disputed fact, and also one which required evidence to be examined.
 - d. Basing its argument on the market value of the parcel of land, which issue was not for determination based on the pleadings and would require evidence to be examined for such a determination to be made.

- e. Disregarding the fact that a court of law cannot rewrite a contract between parties and that the terms of their contract bind the parties unless they can prove that coercion, fraud or undue influence was used to procure the contract.
- f. Disregarding the fact that the plaint dated 3/5/24 and the statement of defence and counterclaim dated 31/5/24 sought orders within the pecuniary jurisdiction of the court.
- g. Entertaining the preliminary objection raised by the respondents on matters of fact and buttressed in their replying affidavit, and entirely disregarding the issues raised by the appellants in their pleadings and submissions, which captured where the pecuniary jurisdiction of the court lie.
- h. Disregarding that the matter was within the pecuniary jurisdiction of the Magistrates' Court, however, it as a court that fell under Section 7 (1) (c) of the Magistrates' Courts Act and it was on that basis only it ought to have downed its tools and referred the matter to the Chief Magistrate's Court for reallocation.
- i. Striking out the notice of motion and the plaint dated 3/5/24 with costs
- j. Failing to be guided by law and procedure in determining the matter and issuing the Ruling dated 19/7/24, and therefore arriving at a wrong conclusion.

4. The appellants sought the following orders;
- a. That this appeal be allowed and the Ruling of the trial court dated 19/7/24 be set aside.
 - b. The appeal be allowed and the notice of motion and the plaint dated 3/5/24 be reinstated and scheduled for hearing.
 - c. The costs of this appeal be borne by the respondents.
 - d. Such other orders as this court may deem and expedient.

The written submissions

5. On 6/10/25, the court directed the parties to file and exchange written submissions. The 1st appellant's submissions are dated 12/7/25; the 2nd appellant's submissions are dated 29/7/25, and the respondents' submissions are also dated 29/7/25. I have read and considered all the submissions.

Analysis and determination

6. Having considered the entire record of appeal, the submissions filed on record, the key issue for determination is whether the appeal is merited. Put differently;
- a) Whether the trial court was correct in holding that the objection was a pure point of law and striking out the suit.
 - b) Whether the trial court erred in concluding that the value of the subject matter of the suit was beyond the pecuniary jurisdiction of the court.

- c) Whether the trial court ought to have transferred the suit to another court
- d) Costs of the suit

7. Before addressing the issues outlined above, the initial concern is the background of the appeal.

8. It is not disputed that the suit arises from a sale agreement entered into between the deceased father/husband of the respondents and the appellants, and the said respondents have been sued as representatives of his estate.

9. The appellants herein were the Plaintiffs in the trial court, whereas the respondents were the defendants. Vide a plaint filed on 3/5/24, they sued the defendants for orders of specific performance, including directing the defendants to facilitate the discharge of title as well as obtain completion documents for the Plaintiffs over parcel No Dagoretti/Rithimitu/760 (suit land), to secure quiet and peaceful possession of the suit land, and to issue a permanent injunction against evicting the Plaintiffs from the suit land. They also sought general damages, and in the alternative, orders for the refund of Kshs 8.0 Million paid as a deposit on the purchase price of Kshs 20 million, along with the refund of renovation costs per the valuation reports, among other reliefs.

10. It was the Plaintiffs' case that they entered into a sale agreement for the suit land with the late Philip James Mwangi Munyua, the registered owner of the suit land, on 29/6/23. A deposit of Kshs 8 million was paid on the

purchase price and held by them, and they renovated the house on the land at a cost of Kshs 2.2 million. Unfortunately, the deceased passed away on 9/1/24 before completing the transaction. They claim that the defendants, as administrators of the deceased's estate, have failed, neglected, and/or declined to complete the transaction and have instead commenced harassment of the plaintiffs, in clear breach of the sale agreement.

11. Simultaneously, the Plaintiffs filed a notice of motion on the same date seeking orders for an injunction to restrain the defendants from jointly with others harassing, trespassing, disposing of, or interfering with the peaceful and quiet enjoyment of the suit land pending the hearing and determination of the case; to maintain the status quo regarding the land; and for the completion of the agreement for sale.
12. Vide an undated replying affidavit sworn by Ruth Nyambura Munyua, the defendants opposed the notice of motion of 3/5/24. They contended that the deceased's family had never relinquished possession of the suit land and accused the plaintiffs of attempting to gain entry to it forcibly. They argued that if any possession was granted by the deceased, then the appellants occupied the suit land as licensees of the deceased. In particular, they averred that the family of the deceased rescinded the agreement via a 21-day notice issued on 21/2/24. In addition, they further maintained that the breach of

contract was caused by the defendants, who failed to complete the sale agreement.

13. As a first appellate Court, this Court has the duty to examine both the law and the facts, and to subject the entire evidence to a fresh and thorough review before reaching a conclusion. However, the Court must remember that it did not have the opportunity to see and hear the witnesses firsthand. This duty is outlined by Section 78 of the Civil Procedure Act, which defines the role of a first appellate Court as to:

‘..... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.’ See also **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123.**

14. With the above principles in mind, I will now embark on determining the appeal.

Whether the trial court was correct in holding that the preliminary objection was merited and consequently striking out the suit.

15. The classical case in the definition of a Preliminary objection is **Mukisa Biscuits Manufacturers Ltd. ... Vs...West End Distributors Ltd. [1969] E.A. 696,** where the Court held that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be

raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

Further Sir Charles Newbold in the same case stated as follows;

“The first matter relates to the increasing practices of raising points which should be argued in the normal manner quite improperly by way of Preliminary Objection. A preliminary Objection is in the nature of what used to be a demurer. It raises pure points of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained and if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but to unnecessarily increase costs and on occasion confuse the issue. The improper procedure should stop.”

16. The effect of the case law cited above is that, to succeed in raising a Preliminary Objection, it must meet the following criteria: it must be pleaded by one party and admitted by the other; it must be a matter of law capable of disposing of the suit; it must not be obscured by factual details requiring evidence; and it must not request the Court to exercise discretion.
17. Where the issue of a court’s jurisdiction is raised, the court ought ordinarily to determine such issue at the earliest opportunity. This is because jurisdiction is

everything and without jurisdiction, a court must down its tools at once. In the case of **the Owners of the Motor Vessel “Lillian SS” -vs- Caltex Oil Kenya Limited [1989] KLR**, Nyarangi, J.A (as he then was) stated:

“...I think 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 obligated 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 business for a continuation of proceedings pending other evidence. It lays down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

18. In the Supreme court decision in the case of **Samuel Kamau Macharia Vs Kenya Commercial Bank & 2 others CA No 2 of 2011** the court held inter alia that;

“ a court’s jurisdiction flows from either the constitution or legislature or both.”

19. Arising from the foregoing, I find that the jurisdiction of a court is a pure point of law.

20. The next question for determination is whether the objection is merited.

21. The preliminary objection, as formulated, challenged the jurisdiction of the trial court to hear and decide the case before it. Therefore, the starting point is to examine

the jurisdiction of magistrates' courts. As previously noted, the issue of a court's jurisdiction is a legislative matter. The jurisdiction of a court derives either from the Constitution, the statute, or both.

22. Section 7 of the Magistrates Act outlines the pecuniary jurisdiction of the court as follows;

Civil jurisdiction of a magistrate's court

- (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —
 - (a) twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) ten million shillings, where the court is presided over by a principal magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
 - (e) five million shillings, where the court is presided over by a resident magistrate.
- (2) The Chief Justice may from time to time, by notice in the *Gazette*, revise the pecuniary limits of jurisdiction set out in subsection (1), taking into account inflation and change in prevailing economic conditions.

23. I have perused the plaint before the trial court, and as earlier discussed, the land was sold at Kshs 20 Million in

2023. A valuation report dated 30/11/23 returned an open market value of Kshs 26,500,00/-

24. The impugned ruling was delivered by Hon SA Opande, the then Principal Magistrate. According to the provisions of the Magistrates' Court Act mentioned above, the court's pecuniary jurisdiction is KShs 10 million. It is not disputed that the consideration in the sale agreement is Kshs 20 Million. The sale agreement forms the basis of the appellants' prayer for specific performance. Inter alia, they contend that they paid a deposit of Kshs 8 million towards the purchase price, and therefore seek an alternative prayer for refunds with interest. Additionally, the plaint contains other claims for damages, some of which are detailed therein, amounting to Kshs 2.2 Million, representing the cost of repairs and renovations.

25. Without belabouring the point further, whichever way the court considers the issue, it is as clear as day as it is as night that the Hon trial court lacked the authority to hear the matter. It is well known that a decision made without jurisdiction is no decision at all; at best, it is a nullity without any legal force.

Whether the trial court erred in concluding that the value of the subject matter of the suit was beyond the pecuniary jurisdiction of the court.

26. The appellants assert that the trial court incorrectly concluded that the sale price of Kshs 20 million was beyond its jurisdiction. For the reasons given in the preceding paragraphs and having examined the trial

court's decision, I concur with its reliance on the valuation report, which the appellants did not contest.

Whether the trial court ought to have transferred the suit to another court

27. Section 18 of the Civil procedure Act provides as follows;

“Power of High Court to withdraw and transfer case instituted in subordinate court

- (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—
 - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the

point at which it was transferred or withdrawn.

28. According to the provisions of the law outlined above, it cannot be gainsaid that the authority to transfer a suit between one subordinate court and another rests with the ELC Court rather than the magistrates' Court. Therefore, I find that the trial magistrate did not have any power to transfer the suit to another court and therefore did not err in striking out the suit.

29. Final orders for disposal

- a. Consequently, I find that the appeal is devoid of merit.
- b. It is diminished with costs in favour of the respondents.

30. Orders accordingly

DATED, SIGNED & DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 4TH DAY OF NOVEMBER 2025.

J G KEMEI

JUDGE

Delivered Online in the presence of:

1. Mr Rerimoi HB for Mr Juma for the Appellant
2. Ms Kathurima for the Respondent
3. Mr Amutala for the Respondents
4. CA – Ms. Yvette