Mwangi v Muruga (Civil Appeal 37 of 2011)
[2025] KEHC 15971 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KEHC 15971 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APPEAL 37 OF 2011

PJO OTIENO, J

NOVEMBER 7, 2025

BETWEEN

CHEGE MWANGI ..... APPELLANT

AND

PAUL KAIRU MURUGA ..... RESPONDENT

(Being an appeal arising from the Judgment and Decree delivered on 1{{^st}} December 2010 and the Ruling and Orders delivered on 25{{^th}} May 2011, both rendered by Hon. D. M. Ochenja (PM) in Kitale CMCC No. 462 of 2023)

JUDGMENT

Background of the Appeal

1. By way of a plaint dated 16th October 2003, the respondent instituted a suit against the appellant seeking judgment for Kshs 110,000/-, being arrears of rent, mesne profits at the rate of Kshs 5,000/- per month from November 2003 until entry of judgment, together with costs of the suit and interest.

2. The respondent's case was that he was the sole registered owner of property known as Kitale Municipality Block 6/157 ("suit property"), as evidenced by a certificate of lease issued to him on 30th June 2003. He averred that he was initially granted a temporary occupation license by the Kitale Municipal Council in 1992, and subsequently, the Commissioner of Lands issued him with a 99-year lease commencing 1st November 2002. The respondent further stated that he constructed a business premise on the property which he operated as a hotel and later leased to the appellant from January 1999 at an agreed monthly rent of Kshs 5,000/-. The appellant, however, only paid rent up to December 2001 but continued in possession and operation of the hotel. The respondent claimed that the appellant stopped paying rent on the pretext that the property did not belong to the respondent, and as a result, rent arrears accrued to Kshs 110,000/-.

3. In his statement of defense dated 21st October 2003, the appellant denied the contents of the plaint, specifically disputing that the respondent was the registered owner of the suit property or that he held any occupational license over the same. The appellant further challenged the jurisdiction of the trial court to entertain the matter.

4. In a judgment delivered on 1st December 2010, the learned trial magistrate found that the respondent had proved ownership of the suit property and established that he had leased the premises to the appellant effective January 1999 at a monthly rent of Kshs. 5,000/-. The court therefore entered judgment in favour of the respondent in the sum of Kshs. 535,000/-, together with costs and interest at court rates.

5. Following the said judgment, the appellant moved the court for stay of execution by an application dated 19th January 2011. The trial magistrate, however, dismissed the application vide a ruling delivered on 25th April 2011.

6. Aggrieved by both decisions of the trial court, the appellant lodged a memorandum of appeal dated 31st May 2011, fronting eight grounds of appeal, and seeking to have the judgment and ruling of the trial court set aside on the grounds that the proceedings were a nullity, ab initio, for want of jurisdiction. The appellant further sought costs of the appeal as well as those of the suit in the lower court. The appeal is premised on the following grounds:

    a. The trial court lacked jurisdiction to deal with this matter which as stated in the plaint was a business premises tenancy subsisting at the time of filing the plaint and therefore governed by the provisions of the Landlord and Tenants (Shops, Hotels and Catering Establishments) Act Cap 301 Laws of Kenya and thereby falling under the jurisdiction of the Business Premises Tribunal; for which reason the entire proceedings herein were nullity and void ab initio.

    b. The learned trial magistrate erred in law and in fact in proceeding to hear the case without first disposing of a point of law raised in defense to the effect that the court lacked jurisdiction, thereby clothing himself with jurisdiction he did not have.

    c. The learned trial magistrate erred in law and in fact in dismissing the defendant's application dated 19th January 2011 and refusing to set aside the ex parte judgment entered by him against the defendant, a decision he arrived at by misinterpreting the law and failing to apply the relevant legal principles and rules.

    d. The learned trial magistrate erred in law and fact when in his ruling he disregarded and/or failed to consider and/or refer to the authorities cited by the defendant's counsel in support of the defendant's application dated 19th January 2011.

    e. The learned trial magistrate erred in law and in fact when, in his ruling he made several extra judicial statements that are clearly unacceptable. For instance, in his own words stating that "the mistakes of the defendant's advocates should be visited on the defendant who should claim against him" and also that "granting the orders sought in the application will highly prejudice the defendant because the matter is likely to take another 8 years to be finalized."

    f. The learned trial magistrate acted in total disregard of the law when he proceeded to fix the suit for judgment without first setting a date of the defense case thereby ignoring the defendant's defense on record which had raised several triable issues.

g. The learned trial magistrate erred in law and in fact in admitting and relying on the plaintiff counsel's authorities which were neither reported nor certified by the respective court registrar and which authorities were therefore dubious for lack of authenticity.

h. The learned trial magistrate erred in fact and in law by delivering judgment when the defense was unaware that the case had proceeded and without having first given notice to the defense as to the date fixed for delivering the same and without making an order as to notice of the judgment being given to the defense.

7. The appeal was directed to be canvassed by way of written submission and both sides have so complied. The court has had the opportunity to peruse the submission and appreciate the parties to have taken the rival positions summarised as below.

Appellant's Submissions

8. The appellant submits that the trial court lacked jurisdiction to entertain the suit, which, as set out in the plaint, involved a business premises tenancy subsisting at the time of filing. He contends that such a tenancy is governed by the provisions of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya, and therefore falls within the jurisdiction of the Business Premises and Rent Tribunal.

9. The appellant refers the court to section 2 of the Act, which expressly defines what amounts to a controlled tenancy and tacit assert that the jurisdiction to determine disputes over such relations are strictly confined to the Business Premises Tribunal.

10. The appellant further contends that a court of law can only exercise jurisdiction as conferred by *the Constitution* or any other written law while relying on the decision of Re Motor Vessel Lilian 'S" vs Caltex Oil (Kenya) ltd (1989) eKLR. On the basis that the trial court lacked jurisdiction to hear and determine the matter, he prays that this Court allow the appeal on that account only.

11. The court reads the submissions to underscore the appreciation by the appellant that the issue of jurisdiction is enough to dispose the appeal without the need to delve into the other grounds.

Respondent's Submissions

12. On the issue of jurisdiction, the respondent submits that the orders sought in the plaint relate to a liquidated claim of Kshs. 110,000/- as accrued rent and mesne profits.

13. He further contends that the preamble of the Landlord & Tenant (Shops, Hotels and Catering Establishments) Act, Cap 301, Laws of Kenya (hereinafter "the Act") defines the Act as "An Act of Parliament to make provision with respect to certain premises for the protection of tenants of such premises from eviction or from exploitation...".

14. The respondent adds that sections 4, 6, and 7 of the Act provide for reference to the Business Premises and Rent Tribunal (BPRT) in matters such as termination of tenancies, rent increases, and rent review. He argues that there is no statutory requirement obliging a landlord to file an action for recovery of rent at the BPRT, and that a tenancy agreement, being a contract, can be enforced by the courts only in the event of a breach.

15. He submits that where there is no express statutory provision curtailing access to the magistrate's court. He cites the decision in John Nthumbi Kamwithi v Asha Akumu Juma [2018] KEHC 5161 (KLR),

referencing Peter Nthenge v Daniel Itumo & Another HCCC No. 1242 of 1974 Nairobi, where the court held:

> " The right of a landlord to distrain for arrears of rent arises at common law and need not be expressly reserved. It enables the landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent or obligations are due. Formerly, the right to distress was of considerable importance to the landlord and was often exercised, but it has now largely fallen into disuse.
>
> This right serves as a remedy for the landlord to recover rent in arrears. For this right to be enforced, there must be rent owing. In the instant case, the appellant's evidence showed that rent was in arrears at the time the notice was issued. There is no provision in the Act requiring the landlord to seek permission from the tribunal to levy distress. The fact that the tenancy is controlled does not preclude the landlord from exercising this right. Distress is a lawful remedy for the recovery of rent, and if the tenant objects, they may file a reference to the tribunal."

16. On this basis, the respondent contends that there is no statutory requirement compelling a landlord to file a claim for rent at the BPRT, and the trial court therefore acted within its jurisdiction.

17. The respondent further submits that the appeal was filed out of time and without leave. While the judgment was delivered on 1st December 2010, the memorandum of appeal was filed on 31st May 2011, six months later, without leave of the court. He argues that no leave was sought to appeal against the ruling refusing to set aside the ex parte judgment, contrary to Order 43 Rule 1 of the Civil Procedure Rules, and that the appellant cannot challenge both the ex parte judgment and the subsequent ruling in the same memorandum of appeal. The respondent therefore contends that the appeals are incompetent for lack of leave and improper joinder.

18. Further, the respondent contends that the appeal against the ruling, though filed within time, is incompetent because a certified copy of the order being appealed against was not included in the record of appeal. He cites Ann Wanoi Thiaka v Penina Muthoni Githiri [2012] KEHC 2835 (KLR), where the court held:

> " Order 42 Rule 2(2) of the Civil Procedure Rules provides for the filing of a certified copy of the order being appealed. The omission to attach a certified copy renders the appeal improperly presented and incapable of being entertained."

19. The respondent also refers to the Court of Appeal decisions in Godfrey Ngumo Nyaga & Another v KCB Ltd, Civil Appeal No. 191/2000 and Zedekia Ogada v Albert Ogutu, Civil Appeal No. 207/1999, where it was held that the failure to include a certified copy of the decree or order being appealed renders the appeal incurably defective.

20. In view of the above, the respondent argues that the appeal should be struck out with costs for being filed out of time, without leave, and for non-compliance with the requirement to include a certified copy of the order or decree being appealed.

Issues, Analysis and Determination

21. Even if the many grounds are put forth, the determination of the appeal must be pivoted on the all-important question of jurisdiction and the others grounds can only be interrogated only once the court finds that the trial court had jurisdiction in the matter so that this court is consequently vested with jurisdiction on appeal.

22. With that appreciation, the court has considered the pleadings, the judgment of the trial court, the memorandum of appeal and the submissions by both parties and identifies the following issues for determination;

    a. Whether the trial court had the jurisdiction to preside over the dispute between the appellant and the respondent?

    b. Only if the above issue be answered in the affirmative;

        i. Whether the appeal against the judgment is properly before the court?

        ii. Whether the trial court erred in failing to set aside the ex parte judgment entered against the appellant?

Whether the trial court had the jurisdiction to preside over the dispute between the appellant and the respondent

23. The appellant challenges the jurisdiction of the trial court, contending that the dispute concerned a hotel business and therefore fell within the jurisdiction of the Business Premises Rent Tribunal (BPRT) established under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301 Laws of Kenya.

24. The starting point is that jurisdiction being all-important, any challenge on it should be raised at the earliest opportunity. In this matter, a careful perusal of the record of the lower court proceedings reveals that that at no point did the appellant question or raise an objection to the jurisdiction of the trial court. The issue of jurisdiction is being raised for the first time on appeal.

25. It is a cardinal principle of appellate practice that an appellate court is not a forum for raising new issues which were not canvassed or determined by the trial court. The role of the appellate court is confined to reviewing matters of fact and law arising from the record of the lower court. This principle is anchored in Order 42 Rule 1 of the Civil Procedure Rules, which limits appeals to matters arising from a decree or order of the lower court.

26. However, it is equally trite that jurisdiction is everything and can be raised at any stage of the proceedings, including on appeal or even by the court on its own motion. The Supreme Court in Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, SC Application No. 2 of 2011; [2012] eKLR emphatically observed that jurisdiction is everything, and without it, a court cannot take even a single step. The Court further held that a court's authority must emanate from *the Constitution* or a statute, and cannot be inferred or assumed.

27. Similarly, in Capital Markets Authority v Jonathan Irungu Ciano & Another, Civil Appeal No. 314 of 2018 [2023] eKLR, the Court of Appeal held that the question of jurisdiction may be raised at any stage, even on appeal, and that courts have a duty to satisfy themselves that they are properly seized of jurisdiction before proceeding.

28. The appellant other than arguing that the dispute arose from a tenancy relating to a hotel, which constitutes a "controlled tenancy" under Section 2(1) of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, and hence within the jurisdiction of the BPRT, stops at that without succinctly pointing out to court the statutory provision that donate the exclusive jurisdiction to the tribunal in all matters connected to controlled tenancies.

29. While is indubitable that the jurisdiction of the BPRT is statutory and limited to disputes arising between landlords and tenants under controlled tenancies. The Tribunal's powers include regulating rent, determining tenancy termination, and addressing unfair eviction. The court appreciates the jurisdiction of the tribunal to be conferred by the provisions of sections 4, 5, 6, and 7 of the Act which provide for reference to the Business Premises and Rent Tribunal (BPRT) in matters such as termination of tenancies, rent increases, and rent review. The court reads nothing in the act to vest the tribunal with jurisdiction to entertain disputes relating to recovery of rent arrears where the landlord wishes not to get vacant possession by termination. With that appreciation, the court finds that to approach the tribunal with a dispute as that which was before the trial court would be to call upon the tribunal to arrogate to itself a jurisdiction not vested by the law. The court finds that the trial court was properly vested with jurisdiction to entertain the matter as it did.

30. Additionally, a casual examination of the pleadings reveals that the appellant, in his statement of defense dated 21st October 2003, expressly denied that the respondent was his landlord or that any tenancy relationship existed. At paragraph 4 of the defense, the appellant stated:

> " The defendant denies paragraph 4 of the plaint, and reiterates that if the plaintiff ever constructed any structures, then the same are not occupied by the defendant..."

31. This categorical denial of a landlord–tenant relationship meant that the existence of a tenancy itself was in dispute. The first issue before the trial court was, therefore, whether such a relationship existed at all. The BPRT's jurisdiction is premised on the existence of a landlord-tenant relationship; once that relationship is denied, the ordinary civil court retains jurisdiction to determine ownership and the existence of tenancy rights.

32. The court thus reiterates and finds that the trial court was properly seized of jurisdiction to hear and determine the dispute between the parties.

33. The foregoing determination now enables the court to delve into the merits of the decision appealed against. However, before so proceeding, there has been raised by the respondent the question of the competence of the composite appeal challenging two decisions made on two different dates.

Whether the appeal against the judgment is properly before the court?

34. The memorandum of appeal is explicit that the appeal challenges the default judgment dated 1.12.2010 as well as the decision dismissing the application to set aside the said default judgment. The court takes the learning that the remedy for a default judgment is setting aside and never an appeal. That is the reason Order 42 Rule 1(1)g limits the right of appeal to only Order 10 Rule 11. It thus follows that even when filed within time without leave, the appeal would remain incompetent.

35. Secondly, section 79G, *Civil Procedure Act* sets the time limit for filing an appeal to be 30 days from the date of decision. The court applies the provision and finds that the appeal against the ex-parte judgment was filed out of time and without leave and must thus be struck out. It is so struck out for being incompetent.

Whether the trial court erred in failing to set aside the ex parte judgment entered against the appellant?

36. The record shows that the appellant was initially represented by Onditi & Company Advocates, who duly filed a memorandum of appearance and a statement of defense dated 21st October 2003 but there was a Notice of Change of Advocates filed by Wambura advocate.

37. The record further indicates that there was counsel for the appellant in court on the 17.10.2007 and actively participated in the proceedings when the plaintiff gave evidence and was extensively cross-examined. However, it would appear that when the matter was next in court on the 24.11.2010, there was no representation on the part of the appellant, even though there was an affidavit of service filed to show that he had been duly served, and the matter proceeded and a judgment was subsequently entered against him. Accordingly, the judgment of the trial court is not a judgment on default of appearance or defense by a judgment emanating from ex-parte proceeding occasioned by non-attendance on the date set for hearing. For that matter the choice to ground the application upon Order 9 Rule 9 (sic Order 10?) was inappropriate. However, such a mistake is not fatal to the application as the oxygen principles and order 51 Rule 10 are a good panacea.

38. In determining the application, the trial court found as a fact that notwithstanding due service, the appellant and counsel chose not to attend. In fact, there was no allegation of non-service. The application was on the basis that the appellant appointed counsel and expected him to be in charge and keep him informed. That to me is an explicit admission that the service was done.

39. Where service is done it takes a good explanation for failure to attend or demonstration of an arguable before an order for setting aside can issue. The appellant never offered a plausible explanation for default just as much as it failed to demonstrate an arguable defense to attract the discretion of the trial court. On that basis the finding by the court is that no basis has been laid to justify setting aside and that the decision of the trial court is beyond reproach.

40. There was also a complaint that the trial court was in error in commenting and finding that the appellant had a recourse against his counsel. The court takes the view that it is not always that a mistake of counsel is never visitable against the client. With the development in our legal systems including an obligation on all advocates to take out a mandatory indemnity insurance cover as a precondition for taking out a practicing certificate, such protection must be employed and advocates taken to task for what may be demonstrated as outright abdication of duty to a client. The trial court was entitled to make that comment.

41. Having found that the trial court was not in error in dismissing the application to set aside, it follows that the entire appeal against the dismissal order is meritless and must fail.

42. In conclusion, the court find that the trial court had jurisdiction to determine the dispute between the parties and further that the application to set aside was unmerited and was correctly dismissed

43. Consequently, the entire appeal is determined to lack merit and is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 7TH DAY OF NOVEMBER 2025.

PATRICK J O OTIENO.

JUDGE