



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC L A NO E165 OF 2024

MICHAEL MUASYA NDUNDA
APPELLANT

=VERSUS=

NAIROBI CITY COUNTY.....1ST
RESPONDENT

LEONE ISLAND INTERNATIONAL LIMITED2ND
RESPONDENT

JUDGMENT

1. By a Memorandum of Appeal dated 5th June 2017, the Appellant appealed against the Ruling of Hon M.W Njagi delivered on 29th May 2017 in RMCC No. 34 of 2015 and set out six grounds of Appeal.

BACKGROUND

2. By a Complaint dated 3rd July 2015, the 1st Respondent sought judgment against the Appellant for Kshs. 1, 887,590/ being the annual rates and interest from the year 2000 to 2015. On 20th August 2015, judgment was entered in favour of the Plaintiff/1st Respondent in accordance with the request for

judgment. A decree for the sum of Kshs. 2, 177, 022/= was issued on 19th August 2015.

3. The Appellant thereafter filed a Notice of Motion dated 19th April 2016 seeking the following orders:-

1) ***THAT the court be pleased to order a stay of proceedings herein pending the hearing and determination of the application.***

2) ***THAT the Court be pleased to set aside the decree passed on 19th August 2015 together with all consequential orders made thereafter on the basis that the Defendant/Applicant has never been served with the necessary summons and/or all Notices and demands.***

3) ***THAT the Defendant/Applicant be at liberty to redeem his property in L.R. No. 12672/45 by paying the Plaintiff the rates and interest due as may be agreed between him and the Plaintiff, and the same be paid in such manner as may be agreed between him and the Plaintiff.***

4. The Respondents opposed the application through their respective Affidavits. The application was dismissed vide the Ruling delivered on 29th May 2017.

5. Dissatisfied with the decision, the Appellant filed the Memorandum of Appeal dated 6th April 2017, on the following grounds:-

a) The Learned Magistrate erred in law and fact in finding that the Appellant's application to set aside the ex parte judgment had no merit.

b) The Learned Magistrate erred in law and fact in finding that the Appellant had been served with Summons.

c) The Learned Magistrate erred in law and fact in not finding that the ex parte judgment was irregular and the decree therefrom was executed in violation of the mandatory provisions of Order 22 Rule 6 of the Civil Procedure Rules.

d) The Learned Magistrate erred in law and fact in failing to take into account the applicable legal principles which entitled the Appellant to the order sought as a matter of right.

e) The Learned Magistrate erred in law and in fact in taking into account irrelevant and inapplicable legal principles and failed to appreciate that the Applicant's liability to the 1st Respondent was not a relevant issue to the Appellant's application.

f) The Learned Magistrate erred in law in dismissing the Appellant's application.

6. The Appellant prays for:-

a) That the order the Learned Magistrate made on 29th May 2017 dismissing the Appellant's

Notice of Motion in RMCC No. 34 of 2015 be set aside.

b) THAT the Appellant's Notice of Motion dated 19th April 2016 be allowed.

c) THAT the costs of this appeal, and the Appellant's application, be awarded to the Appellant.

7. The 1st Respondent filed a Notice of Preliminary Objection dated 23rd January 2024, arguing that the Appeal is incompetent because it is based on a per incuriam Ruling delivered on 8th July 2024 in HCCA No. 280 of 2017, in which the High Court acknowledged it lacked jurisdiction but erroneously transferred the matter to this court.
8. The preliminary objection was canvassed by way of written submissions.

THE 1ST RESPONDENT'S SUBMISSIONS

9. The 1st Respondent filed two sets of submissions dated 11th January 2025 and 18th March 2025.
10. On its behalf, Counsel submitted that the 1st Respondent is challenging the Appeal on the grounds that the High Court in HCCA No 280 of 2017 upheld the 1st Respondent's Preliminary Objection, asserting that it lacked jurisdiction because the subject matter falls within the jurisdiction of this court. Counsel further submitted that the High Court acknowledged in its Ruling that it lacked jurisdiction but erroneously proceeded to transfer the Appeal. Following an

incompetent appeal, the High Court arrogated to itself jurisdiction to transfer an incompetent appeal.

11. Counsel argued that the High Court's attempt to transfer the suit amounts to judicial craftsmanship aimed at legalizing an otherwise incompetent case through transfer. To support this argument, reliance was placed on the case of **Equity Bank Limited v Bruce Mutie Mututku t/a Diani Tour Travel (2016) eKLR**, where the court held that:

“.....it is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists...”

12. Counsel submitted that when a suit is filed without jurisdiction, the only remedy is to withdraw it and file a suit in the court that has jurisdiction. To support this point, reliance was placed on the case of **Phoenix of E A Assurance Company Limited v S.M Thiga t/a Newspaper Service**, where it was held that:-

“If an act is void, then in law it is a nullity... and every proceeding which is found on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse....”

13. Counsel urged the court to find that the appeal is incompetent and a nullity, as it is based on a per incuriam Ruling of the High Court delivered on 8th July 2024. Counsel further submitted that transferring an incompetent appeal to a court with proper jurisdiction does not legitimize the

appeal. Counsel argued that the court should determine that its jurisdiction cannot be transferred based on an illegality.

14. Counsel argued that transferring an incompetent suit to a court with proper jurisdiction cannot revive an incompetent suit. To support this, reliance was placed on the case of **Coastal Bottlers Limited v Acqualine Distributors Limited, KECA 1806 (KLR)**

15. Counsel further submitted that a judge's inherent discretion cannot confer jurisdiction to this court. Reliance was placed on the case of **O'kongo v Loibex Builders & 5 others (Petition E088 of 2024) KEHC 4855, where Mugambi J held that**

“The Petition having been filed in a court that has no jurisdiction, the same cannot survive.

16. Counsel urged the court to declare the appeal invalid on the grounds that it was filed in a court without jurisdiction. Counsel further argued that a court without jurisdiction cannot issue transfer orders. To support this point, Counsel cited the case of **Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & another (2012)**, where the court held that:-

“Whenever a matter is filed before a court lacking jurisdiction, the professional error there committed is a fundamental one which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client.....it is incompetent and void in law; and

therefore it is not a motion or suit that can be transferred to any other court. It is therefore the duty of the court or tribunal before which such a matter is first brought to declare its status as a nullity; and it follows that such a matter has no capacity to be transferred to any other court.

17. Counsel argued that Justice Meoli lacked jurisdiction to issue the transfer order since she acknowledged that the High Court lacked jurisdiction to hear the appeal. Counsel emphasized that the court's inherent discretion cannot confer jurisdiction where none exists under the law or the Constitution. To support this point, Counsel relied on the case of **Apa Insurance Company v Vincent Nthuka (2018) EKLRA.**

THE 2ND RESPONDENT'S SUBMISSIONS

18. The 2nd Respondent filed its submissions dated 13th March 2024. On behalf of the 2nd Respondent, Counsel submitted that the Preliminary Objection is merited, as the appeal is incompetent and a nullity, since it is based on a per incuriam Ruling delivered on 8th July 2024. Counsel submitted that the High Court acknowledged it lacked jurisdiction but erroneously transferred the matter to this court. To buttress this argument, reliance was placed on the cases of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others (2012) Eklr**, **PHOENIX E. A Assurance Company Limited v M Thiga t/a Newspaper Service (2019)**, **Equity Bank Limited v Bruce Mutie Mutuku t/a**

Diani Tour Travel (2016) eKLR, Albert Chaurembo Mumba and 7 others v Maurice Munyao & 18 others (2019) eKLR, and Macfoy v United Africa Co Ltd (1961) 3 ALL ER 1169.

19. In conclusion, Counsel submitted that the appeal is incompetent and should be struck out with costs.

THE APPELLANT'S SUBMISSIONS

20. The Appellant filed his submissions dated 26th February 2025.
21. On behalf of the Appellant, Counsel submitted that the Preliminary Objection is unfounded because the 1st Respondent did not seek to set aside or review the transfer order. Based on the foregoing, Counsel maintained that the transfer order remained valid. In conclusion, Counsel urged the court to dismiss the Preliminary Objection with costs.

ANALYSIS AND DETERMINATION

22. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law. In **Mukisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696**, Law JA stated;

“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are

bound by the contract giving rise to the suit to refer the dispute to arbitration.”

23. In **ORARO Vs MBAJA 2005 eKLR OJWANG J** (as he then was) described it as follows: -

“I think the principle is abundantly clear. A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and, in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary Objection.

24. The issue of jurisdiction is a pure point of law that can determine the matter without having to consider the merits of the case. This Court is therefore satisfied that the 1st Respondent’s Preliminary Objection is based on a pure point of law. Having considered the Preliminary Objection and the parties’ submissions, the only issue for determination is whether this court has jurisdiction to hear and determine this Appeal.
25. It is trite law that jurisdiction is everything, and without it, the court cannot take one more step in the case. The locus classicus on jurisdiction is the celebrated case of **Owners of**

Motor Vessel ‘Lillian S’ Vs Caltex Oil (Kenya) Limited (1989) eKLR, where the Court held that:-

“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 a continuation of proceedings...”

26. Similarly, in the case of **Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR** the Supreme Court pronounced itself 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. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation....”

27. The 1st Respondent argued that the appeal is a nullity and therefore this court lacks jurisdiction to hear and determine it. It was argued that the High Court recognized it lacked jurisdiction to determine the appeal but erroneously transferred it to this court for hearing and determination. Counsel contended that because the High Court lacked

jurisdiction to hear the Appeal, it likewise lacked jurisdiction to transfer it to this court.

28. The Respondents contend that the Appeal is incompetent because it is based on a per incuriam Ruling of the High Court. They argued that the High Court lacked jurisdiction to hear the Appeal, as the subject matter falls within this court's jurisdiction. Based on the foregoing, the Respondents maintain that the High Court lacked jurisdiction to transfer an incompetent appeal to this court for hearing and determination. They urged the court to find that its jurisdiction cannot be founded on an illegality.
29. It is trite that proceedings instituted before a court without jurisdiction are a nullity. In **Kagenyi v Musiramo & another (1968) EA 43**, the court held that a court without jurisdiction cannot invoke transfer powers.
30. It is well established that orders of a superior court remain valid, binding, and enforceable unless and until they are set aside on appeal or review. It is not in dispute that the High Court issued a specific order transferring the appeal herein to this court for hearing and determination. In the case of **Benjo Amalgamated Ltd & another v Kenya Commercial Bank Ltd (2014)**, the Supreme Court held that:-

“A court order, whether right or wrong, remains valid and binding until set aside on appeal or review.”
31. The Respondents argued that the transfer order is illegal and urged the court to declare it so. As correctly observed by the

Appellant, the 1st Respondent did not appeal or seek to review the transfer order. Although the Respondents contend that the High Court acted without jurisdiction, this court lacks appellate or supervisory authority over the High Court. It cannot invalidate or set aside the transfer order, as doing so would contravene the Constitutional framework for appellate jurisdiction set out in Articles 162 and 165. In the case of **Republic v Kenya School of Law & Council of Legal Education Ex parte Daniel Mwaura Marai (2014) eKLR**, the court held that a court with concurrent jurisdiction cannot correct a legal error in a superior court's decision.

32. Unless the court order has been reviewed or set aside, this court must act on it. Based on the foregoing, I find that the Preliminary Objection is not merited and the same is hereby dismissed.
33. Regarding the second issue, parties agreed to canvass the appeal by way of written submissions.

THE APPELLANT'S SUBMISSIONS

34. The Appellant filed his submissions dated 26th February 2025.
35. On behalf of the Appellant, Counsel submitted that the Appellant was never served with Summons or the Statutory Notices and demands under the Rating Act in accordance with the Civil Procedure Rules. Counsel submitted that Wilbroda Mackutwa, in her Affidavit of Service sworn on 5th August 2017, falsely claimed that she served the Appellant with a Notice to Show Cause why execution should not be issued, the Prohibitory Order dated 23rd October, 2015, and

the notice of the day fixed for setting a sale notification dated 26th October, 2015. Counsel submitted that the 1st Respondent was required to serve a demand notice upon the Appellant before filing this suit.

36. Counsel submitted that Section 15 of the Rating Act provides that the 1st Respondent shall give the rate payer 30 days to pay the rates owed, while Section 17 of the Act provides that if payment is not received, a demand for payment must be made within 14 days after service, failing which the 1st Respondent would be at liberty to commence proceedings.
37. Counsel submitted that the property rates payment request dated 20th April, 2015, was initially addressed to E.F. COCKBURN, but his name was later crossed out, and the Appellant's name was handwritten in its place. Counsel argued that the property rates payment request and the demand for rates and interest dated 20th May, 2015, were not served because they did not include the Appellant's postal address. It was further submitted that the 1st Respondent did not show how the demand for rates was served upon the Appellant, leading to the conclusion that it was not properly served.
38. Counsel submitted that the Appellant was not served with Summons. Counsel cited the law governing the service of Summons as set out in Section 17(4) of the Rating Act and Order 5, Rules 6 and 12 of the Civil Procedure Rules. It was further submitted that the Magistrate held that service can

be effected by affixing the Summons to a conspicuous part of the land.

39. It was submitted that the 1st Respondent had a duty to personally serve the Appellant. Counsel argued that affixing the summons in a conspicuous place should be used only as a last resort. Counsel contended that the learned magistrate erred in law and fact by holding that the service was valid merely because the mode of service used by the 1st Respondent was permitted by law. Counsel submitted that the 1st Respondent did not attempt to locate the Appellant in person or seek leave to serve the Appellant through substituted service by affixing the Summons in a conspicuous place in the court or by advertisement in a newspaper.
40. Counsel argued that the 1st Respondent had no intention of informing the Appellant of the commencement of these proceedings. In conclusion, Counsel urged the court to allow the appeal as prayed. To support his submissions, Counsel relied on the list of authorities attached to the submissions.

THE 1ST RESPONDENT'S SUBMISSIONS

41. The 1st Respondent filed its submissions dated 18th March 2025
42. On behalf of the 1st Respondent, Counsel submitted that the appeal seeks to introduce new evidence on the issue of service of Summons without the court's leave. Counsel further submitted that an unsuccessful party should not seek to adduce additional evidence to strengthen their case by patching up gaps or weak points. To support this argument,

reliance was placed on the case of **Owner of Motor Vessel 'Dolphin Star' v ET Timbers PTE Limited (2024) KECacitng Mohammed Abdi Mohammoud v Ahmed Abdulahi Mohammed & 3 others (2018) eKLR**. Further reliance was placed on the case of **Wanje v A.K Saikwa**.

43. Counsel submitted that in the application dated 19th April 2016, the Appellant sought to set aside the Decree dated 9th August 2015 on the grounds that he was never served with the Summons and the necessary notices and demands. However, the court, in its Ruling, found that service was effected on the Appellant by affixing the Summons to a Mugumo Tree within the suit property. Counsel contended that the Appellant did not challenge the evidence by calling the process server for cross-examination. Counsel further contended that the Appellant is attempting to cover up his indolence by introducing new evidence without the court's leave.
44. Counsel further submitted that service effected under Section 17(4) of the Rating Act does not require the Plaintiff or the process server to inquire whether the Defendant visits the suit property before selecting the mode of service. Counsel argued that the absence of alternative modes of service does not invalidate the selected mode of service, nor does it indicate a lack of diligence on the part of the process server.
45. Counsel submitted that the Appellant failed to demonstrate any irregularity on the part of the Trial Magistrate. Counsel relied on the case of **Eunice Muthoni Karuga & 2 others**

National Irrigation Board (20100KEHE 1026(KLR), citing Mbogo v Shah, to submit that the discretion to set aside a judgment should be exercised judiciously. Counsel further submitted that the ex parte judgment was regular because the service complied with Section 17(4) of the Rating Act. To buttress this point, reliance was placed on the case **of Fidelity Commercial Bank Ltd vs Owen Amos Ndungú & another, HCC No. 241 of 1988 (UR), as cited in Kapari Limited v Nester Dishon Gatuku & another (2019) KEHC 6262(KLR).**

46. In conclusion, Counsel urged the court to find the appeal incompetent and dismiss it with costs.

THE 2ND RESPONDENT'S SUBMISSIONS

47. The 2nd Respondent filed its submissions dated 13th March 2025.
48. Counsel for the 2nd Respondent argued that the Appellant's application to set aside the Ruling was based on the claim that he was not served with the Summons. Counsel noted that the Appellant admitted to being served but questioned whether Wilbroda Mackutwa was a licensed process server. Additionally, Counsel mentioned that the 1st Respondent submitted a certificate from the process server, confirming her license for 2015. Counsel also argued that the 1st Respondent was not obligated to follow the service methods outlined in the Civil Procedure Rules because the Rating Act, which governs the case, allows for alternative methods of service.

49. Counsel submitted that the Appellant failed to attach a draft Defence to the application to set aside or to indicate the prejudice he would suffer if the Ruling is not set aside. It was further submitted that the Appellant did not seek leave to defend the suit or offer any explanation for his inaction
50. Counsel further submitted that the Appellant, the previous owner of the suit property, had a duty to pay rates. Counsel also submitted that the Appellant did not challenge the contents of the demand at the hearing of the application. Counsel argued that the process server in an Affidavit of Service confirmed that the Appellant was served. Counsel noted that the Appellant did not contest the Affidavit

ANALYSIS AND DETERMINATION

51. Having considered the record and Supplementary Record of Appeal and the submissions by the parties, the only issue for determination is whether the appeal is merited.
52. This appeal arises from the Ruling of the subordinate court issued on 29th May 2017, which dismissed the Appellant's application seeking to set aside orders vesting the suit property in the 1st Respondent due to non-payment of land rates.
53. Before the trial court, the Appellant contended that he had not been served with the Summons, the Statutory Demand, or the Notices, and that the process server was unqualified. In her Ruling, the trial magistrate found that the Appellant had been served by affixing the Summons to a Mugumo tree.

54. The Appellant's main grievance is that he was never served with the Summons, Demand, and Notices in accordance with the Civil Procedure Rules.
55. The Respondents contend that the Appellant was properly served with the Summons and all the Demand Notices. They relied on the Affidavit of Service sworn by Wilbroda Makcutwa to prove that service was effected.
56. The law governing the enforcement of unpaid land rates is based on the Rating Act. The Respondents maintained that the Rating Act is the substantive law and that they were not required to serve the Appellant under the Civil Procedure Rules.
57. Where a substantive statute such as the Rating Act expressly provides for the mode of service, parties are bound by those provisions. In the case of **Republic v National Environment Management Authority (NEMA) (2011) eKLR**, the court held that

“Where a statute has provided a specific procedure, that procedure must be strictly adhered to since it is not for the court to substitute or supplement a statutory provision.”

The Rating Act sets out how summons, demands, and enforcement notices should be served. **Section 17(2) of the Rating Act** provides as follows:-

“Every summons issued in proceedings taken under this section shall order the defendant to appear and answer the claim on a day to be

therein specified, and every such summons may be served.

a) by post; or

b) by fixing it onto some conspicuous part of the land; or

c) by any mode of service authorized by any rules made under the Civil Procedure Act.”

58. The Appellant contends that the main issue for determination is whether the 1st Respondent served him with the summons and the statutory Notices and Demands. He further asserts that Wilbroda Macuktwa filed similar affidavits regarding the documents served upon him.
59. Where a statute permits service by affixation to the property, it must be placed in a conspicuous place to notify the owner. The law does not prescribe the exact physical structure to which such notice must be affixed.
60. The Appellant argued that the service was intended for him to miss it out. The Learned Trial Magistrate held that Section 17(4)(b) of the Rating Act does not mandate the Defendant to first enquire whether the Defendant visits the property or not before settling on that mode of service. The court found that the Summons was duly served on the Appellant by affixing it to a Mugumo tree within the suit property. The Rating Act does not state what constitutes a conspicuous part. It is not in dispute that the Mugumo tree is located within the suit property.

61. In the case of **Republic v City Council of Nairobi ex parte Thabiti Enterprises Ltd (2014)**, the court held that **service by affixation on the property is valid where the law allows it**, service by affixing a notice is permissible provided that it is reasonably calculated to notify the affected party of the intended administrative action.
62. The Appellant did not demonstrate that the Mugumo Tree was an inconspicuous place for service or that the mode of service prejudiced him.
63. The Appellant asserted that the process server falsely claimed to have served him. During the trial in the lower court, the Appellant challenged Wilbroda Macuktwa's authority to serve the Summons. The 1st Respondent produced her certificate to prove that she was a qualified process server. The Affidavit of Service, sworn by Wilbroda Mackutwa, on 5th August 2015, describes how she served the Appellant with a copy of the Plaint and Summons. The record clearly shows that the 1st Respondent disputed the service effected by Wilbroda. It is trite that when service is denied, the proper procedure is to seek cross-examination of the process server.
64. In the case of **Shadrack Arap Baiyo v Bodi Bach (1987)** **Eklr**, the Court of Appeal held that an Affidavit of Service is prima facie evidence of service unless successfully challenged by cross-examination. Failure to do so leaves the Affidavit of Service unchallenged, and the facts therein are deemed admitted.

65. Similarly, in the case of **John Akasike v Akasike (2105)**, the court held that a party who fails to cross-examine a process server cannot later dispute service on appeal. Based on the foregoing, I find the Appellants' attempt to impeach service at this stage untenable.
66. Based on the foregoing, it is clear that an affidavit of service is prima facie evidence of service, and when service is denied, it can be challenged through cross-examination of the process server.
67. The Appellant did not challenge the Affidavit through cross-examination. The Learned Trial Magistrate noted as much. The Appellants arguments regarding the propriety of affixation and service of the Summons raise factual issues that were not canvassed at the trial. As correctly submitted by the Respondents, an appeal is not an avenue or opportunity to introduce new evidence or to fill gaps in a party's case. Additional evidence on appeal can only be admitted with the court's leave and upon satisfying the established legal threshold.
68. Based on the foregoing, this court is satisfied that the learned trial magistrate properly analyzed the evidence on record in reaching her decision.
69. The upshot of the foregoing is that I find the appeal is devoid of merit, and the same is hereby dismissed. Each party to bear its own costs.

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 11TH DAY OF DECEMBER, 2025.**

.....
T. MURIGI
JUDGE

IN THE PRESENCE OF

Njongoro for the Appellant

Odayo Ochieng holding brief for Ms Misiati for the 1st Respondent

Njugi for the 2nd Respondent

Ahmed – Court Assistant

ORIGINAL