

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**CIVIL APPEAL NO. E251 OF 2024**

**THE COUNTY GOVERNMENT OF KISUMU ..... APPELLANT**

**- VERSUS -**

**SILAS ONDIEKI KUNGU & 9 OTHERS ..... RESPONDENT**

**(Being an appeal from the Ruling of Hon. L.N. Kiniale SPM delivered on the  
14/11/2024 in Nyando SPMCC No. 109 of 2019, Silas Ondieki Kungu & 9  
Others v The County Government of Kisumu)**

**J U D G M E N T**

1. The respondents sued the appellant seeking to restrain it from interfering with their peaceful occupation of all kiosks built pursuant to the M.O.U dated **26/3/1998** and a secondary M.O.U dated **23/6/1999** as well as a declaration that pursuant to the aforementioned M.O.U's all the kiosks and/or shops were legally owned by them.
2. The appellant did not file any statement of defence against the averments made by the respondents. However, it called 2 witnesses in its defence.
3. Consequently, the trial court held that as there was no defence filed, there was no basis upon which their witnesses testified or that their submissions filed. The trial court proceeded to enter judgment in favour of the respondents and granted them the orders sought.

4. It is the aforesaid ruling that is the subject of this appeal. The appellant impugned the trial court's ruling vide a memorandum of appeal dated 29/11/2024 on the following five (5) grounds, that: -

- a) *The learned trial magistrate erred in law and fact in failing to appreciate that the suit was filed as a Civil Suit yet the issues affected title to land thus making it Environment and Land Case. The court sitting as a Civil Court had no jurisdiction to hear and determine the matter. The title of the case in all pleadings filed capture that the matter as Civil Case but surprisingly the title of the judgment is changed to Environment and Land Case.*
- b) *The learned trial magistrate erred in law and fact in failing to appreciate that even if the suit was not defended, it was still incumbent upon the plaintiff to prove his case within required standards of proof within balance of probabilities.*
- c) *The learned trial magistrate erred in both fact and law failing to appreciate that the suit filed was incompetent noting that the suit filed on behalf and for registered group was not filed by the officials of the group but plaintiffs in their personal capacity.*

- d) The learned trial magistrate erred in fact and law by failing to consider the submissions by the appellant/defendant thus covering the principals set by the Court of Appeal in the case of Trust Bank Limited v Amalo Company Limited 2002] eKLR that the court is duty bound to consider all the documents and pleadings filed in a suit for proper administration of justice.*
- e) The learned trial magistrate erred in fact and in law in not appreciating sufficiently or at all the pleadings and evidence on record as a whole and considered extraneous factors thus arriving at the manifestly wrong conclusions.*
5. The parties agreed to dispose off the appeal by way of written submissions. The appellant submitted that the magistrate's court sitting as a civil court lacked the jurisdiction to entertain the respondent's claim which fell within the jurisdiction of the environmental and land court but was disguised as a civil claim. That therefore, the decision emanating therefrom was null and void ab initio.
6. That respondents' suit ought to have been filed by their elected officials, to wit, its chairman, secretary or treasurer, whereas it was filed by the

respondents in their individual capacities as was held in the case of **Kahindi Katana Mwango & Another v Cannon Assurance K. Ltd (2013) eKLR.**

7. That the respondents' case was fatally defective and ought to have been dismissed with costs.
8. On their part, the respondents submitted that the dispute between themselves and the appellant was about who constructed the kiosks at Ahero and whether the appellant's demand for rent was justified. That the trial court was thus justified in its findings that the appellant had no right in demanding for rent despite not participating in the construction of the kiosks.
9. That their suit before the trial court was undefended and as such the appellant is estopped from defending the suit at this appellate stage. That the suit before the trial court was properly instituted by the respondents' members and officials and was thus properly before court.
10. Before getting into the merits of this appeal, this Court has to determine the issue of the trial court's jurisdiction to entertain the respondents' claim as the same would have an impact of this Court's own jurisdiction to entertain the present appeal.
11. The appellant contended that the issues raised by the respondents in their claim, though disguised as civil in nature before the trial court, fell within

the mandate of the Environment and Land Court and that since the trial court was acting as a civil court, it lacked jurisdiction to entertain the claim. On their part, the respondents asserted that their claim was purely a rental dispute wherein the appellants were demanding rent over kiosks they did not help build as agreed.

12. When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts apply the Dominant Issue Test. In Suzanne Butler & 4 Others v Redhill Investments & Another [2017] eKLR, it was held as follows: -

*“When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-Dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works.*

*The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant*

*purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse.*

*Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”*

13. As earlier stated, the respondents’ sought injunctive relief against the appellants from interfering with their peaceful occupation of all kiosks built pursuant to the M.O.U dated **23/6/1999** and secondary to the M.O.U dated **26/3/1998**. Further, that pursuant to the aforementioned M.O.U’s, all the kiosks and/or shops were legally owned by them. It was their case that having failed to play their part in the aforementioned M.O.U’s, the appellant had no right to evict them from the kiosks/shops they had built.
14. My understanding of the respondents’ claim was that they sought to stop the appellant from interfering with their use and occupation of the land where they had built their shops/kiosks. In essence, their claim sought protection

over their use and occupation of a given piece of land. It thus fell within the jurisdiction of the Environmental and Land Court.

15. The question then follows whether the trial court was acting as an Environmental and Land Court or as a Civil Court. The appellant contended that the trial court was acting as a civil court and merely titled its heading as an Environment and Land Court in its judgment.
16. **Article 162(2)(b)** of *the Constitution* of Kenya 2010 grant the Environment and Land Court original jurisdiction over land disputes, including title and tenure, irrespective of pecuniary value. **Section 13** of the *Environment and Land Court Act* goes further to define the jurisdiction of the Environment and Land Court.
17. The provision of **Section 26 (3)** and **(4)** of the *Environment and Land Court Act, 2011* provides:

***(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.***

***(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —***

*a. Disputes relating to offences defined in any Act of Parliament dealing with environment and land; and*

*b. Matters of civil nature involving occupation, 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.*

18. Pursuant to the provisions of the Constitution and the Environment and Land Act, practice directions have been published more particularly in ***Gazette Notice No. 5178 of 28<sup>th</sup> July, 2014*** with respect to, *inter alia*, proceedings relating to the environment, the use and occupation of and title to land.
19. The directions provided, *inter alia*, that magistrates' courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. Appeals from the Magistrates Courts and Tribunals shall lie to the Environment and Land Court pursuant to ***Section 13 (4)*** of the ***Environment and Land Court Act***.
20. Notwithstanding the practice directions, ***section 13(2)(a)*** and ***(4)*** are clear that the Environment and Land Court shall not only hear and determine disputes relating to environmental planning and protection, trade, climate

issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources but that it shall also exercise appellate jurisdiction over decisions of subordinate courts or local tribunals relating to these same matters of which it is seized of jurisdiction.

21. In the present case, it is important to note that disputes over rents are such matters that fall within this court's jurisdiction, irrespective of whether it is original or appellate.
22. It is common knowledge that the former Chief Justice had by various gazette notices, made appointments pursuant to **Section 26 (3) and (4)** of the ***Environment and Land Court Act, 2011*** to have the magistrates court handle cases involving occupation and title to land. The gazette notices include ***Gazette Notice No 1472*** dated ***March 1, 2016***, ***Gazette Notice No 1475*** dated ***March 14, 2016***, ***Gazette Notice No 11930*** dated ***December 5, 2017*** and ***Gazette Notice No 2575*** dated ***February 28, 2019***. Thus, there exist within the magistrates' courts, several magistrates duly gazetted and granted jurisdiction and power to handle cases involving occupation and title to land.
23. In the circumstances, having found that the respondents' claim fell within the jurisdiction of the Environment and Land Court, the question is whether

the appellant proved that the trial magistrate was not gazetted to act as an Environment and Land Court.

24. To my mind, there is no evidence by the appellant that the trial magistrate was not gazetted as an Environment and Land Court Magistrate. He who alleges must prove. In the circumstances, I find that the trial court had jurisdiction to entertain the respondents' claim.
25. From the foregoing, the question is whether having found that the respondents' claim fell within the purview of the Environment and Land Court, this court can proceed to entertain the present appeal.
26. It is trite that Appeals from the Magistrates Courts and Tribunals shall lie in the Environment and Land Court pursuant to **Section 13 (4)** of the ***Environment and Land Court Act***.
27. Consequently, as jurisdiction is everything, this Court lacks jurisdiction to entertain the instant appeal. The appeal is hereby struck out with costs to the respondents.

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 25<sup>th</sup> day of **March, 2026**.

**A. MABEYA, FCI Arb**

**JUDGE**