

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ELCLA No. E012 OF 2024

BETWEEN

JAMES NYAMBANE MOMANYI
APPELLANT

AND

MONICAH MORAA GORI 1ST
RESPONDENT
VICTOR MORURI GORI 2ND
RESPONDENT
ROSE KERUBO GORI
3RD RESPONDENT
DUKE ABONGO BUNDI 4TH
RESPONDENT

***(Being an appeal from the judgment and decree of the
Chief Magistrate’s Court at Nyamira (C I Agutu, Senior
Resident Magistrate) delivered on 30th October 2024 in
Nyamira MCELC No. 20 of 2020)***

JUDGMENT

1. Proceedings leading to this appeal commenced in the Subordinate Court on 27th February 2020 when the Respondents filed Plaintiff dated 27th February 2020, against the Appellant. The case was filed from the onset as an Environment and Land Court case. The Respondents averred in the Plaintiff that the First Respondent got married to the

Appellant under Kisii Customary Law in or about 1980 and that the marriage was blessed with three children, being the Second to Fourth Respondents.

2. The Respondents further averred that all was well until the First Respondent fell sick in 1988 when the Appellant took her to hospital after which he took her to her biological parents, left her there and remarried. That the Second, Third and Fourth Respondents remained with the Appellant and that on or about 6th January 2020, the Appellant chased them from land parcel number North Mugirango/Bonyarorande/1202 (suit property) where they were constructing a house, had them arrested and asked them to DNA certificates to prove paternity before they could continue with construction.
3. The Respondents therefore prayed for judgment against the Appellant for the following orders:
 - a) *An order directing the Defendant to carry on D.N.A together with the 3 issues of the marriage.*
 - b) *The Defendant to allow the 2nd, 3rd and 4th Plaintiff to proceed constructing their houses on parcel of land North Mugirango/Bonyarorande/1202.*
 - c) *Costs of this suit interest at Court Rates.*
 - d) *Any other relief this Honorable Court may deem fit and just to grant.*

4. The Appellant reacted to the suit by filing a Statement of Defence dated 14th February 2021. He denied the Respondents' averments, admitted jurisdiction of the Subordinate Court and averred that the suit was fatally defective. He prayed that the suit be dismissed and that judgment be entered in his favour for an order that the Respondents stay away from him, the suit property and his family and that he be awarded costs and any other relief that the Subordinate Court deemed fit.
5. Upon hearing the matter, the Subordinate Court (C I Agutu, Senior Resident Magistrate) delivered judgment on 30th October 2024 in which it ordered the Appellant to undergo DNA testing together with the Second to Fourth Respondents. The Court further ordered that the Second to Fourth Respondents were allowed to proceed with construction of their houses on the suit property and awarded costs to the Respondents.
6. Aggrieved by the judgment and decree, the Appellant filed this appeal through Memorandum of Appeal dated 29th November 2024 and prayed that the appeal be allowed, that the judgment be set aside and that he be awarded costs of both the appeal and of the proceedings in the Subordinate Court.
7. The following are the grounds of appeal as listed on the face of the Memorandum of Appeal:

1. *That the learned magistrate erred in law and in fact in ordering the appellant to undergo DNA testing together with the 2nd, 3rd and 4th respondents.*
2. *That the learned magistrate erred in law and in fact in ordering the appellant to undergo DNA testing overlooking his right of dignity.*
3. *That the learned magistrate erred in law and in fact in ordering the appellant to undergo DNA testing together with the 2nd, 3rd and 4th respondents despite qualifications for conducting a DNA having not been met by the respondents.*
4. *That the learned magistrate erred in law and in fact in holding that the 2nd, 3rd, 4th, and 5th respondents to proceed with the construction of their houses on parcel of land North Mugirango/Bonyarorande/1202 without adequately addressing issues on ownership, legal rights and consent.*
5. *That the learned magistrate erred in law and in fact in finding that the 2nd, 3rd, and 4th respondents have a legitimate right to the parcel of land North Mugirango/Bonyarorande/1202.*
6. *That the learned magistrate misdirected herself by ordering that the costs of the suit be borne by the*

appellant without sufficient justification or consideration of the circumstances.

7. That the learned magistrate failed to consider evidence and submissions presented by the appellant, resulting in an erroneous and unjust decision.

8. The appeal was canvassed through written submissions. The Appellant filed submissions dated 8th July 2025. It was submitted on his behalf that the issue of paternity is fundamentally a matter for the Family Division of the High Court and that the trial Court should have excluded itself from presiding over the matter and have the Respondents transfer the matter to a family Court for determination of whether the Appellant should undergo DNA testing.
9. It was also submitted that without conclusive paternity, the Respondents could not lay any claim on the Appellant's. Relying on the cases of **M. W. v K.C. [20151 eKLR, HCK vs. EJK [2008] eKLR** and **SWM VS. GMK [20121 eKLR**, it was submitted that any claim premised on inheritance, division of property or construction on the suit property was premature and speculative.
10. It was further submitted that the decision was against the weight of the evidence and that constructing on the suit property without proof of ownership or proven equitable interest was irregular and contrary to proprietary rights under **Article 40** of the **Constitution** and the **Land Registration**

Act. That there was no parental or legal obligation owed by the Appellant to the Respondents to warrant such orders. The cases of **R vs Chief Immigration Officer (1976) 3 AER 843** and **Wreck Motors Enterprises v The Commissioner of Lands and Others [1997] eKLR** were cited in support of those arguments.

11. Additionally, it was contended that pursuant to Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act, the jurisdiction of the Court is limited to disputes on occupation, use, and title to land and that the Subordinate Court lacked jurisdiction since the Respondents' case was one of entitlement through alleged fatherhood. Citing the cases of **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**, **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** and **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR**, the Appellant urged the Court to allow the appeal.

12. The Respondents filed submissions dated 14th October 2025 in which it was submitted that the issue of jurisdiction did not arise since Appellant admitted jurisdiction both in his Statement of Defence and before this Court. That the dispute concerned matters of occupation and use of land since the Respondents had been residents of the suit property and

further considering the prayer in the Plaint that they be allowed to continue construction in the suit property.

13.It was additionally submitted that the issue of paternity arose since the Respondents' use and occupation of the suit property was interrupted by the Appellant who was claiming that the Second to Fourth Respondents were not his children. That for the dispute to be resolved, it was necessary that paternity be determined.

14.It was further submitted that this was not a family matter as the Respondents were not praying for subdivision of the suit property but were only claiming that they be allowed the use and occupation of a portion that had been allocated to them and where they had started constructing a house. Relying on **Sections 3 and 3A** of the **Civil Procedure Act** as well as **Section 107 (1)** of the **Evidence Act**, the Respondents contended that the Subordinate Court was justified in ordering DNA test. They concluded by submitting that the appeal is without merit and urged the Court to dismiss it with costs to them.

15.This is a first appeal. The remit of a first appellate court was restated by the Court of Appeal in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** thus:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to

re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

16.I have carefully considered the grounds of appeal, the entire record and the parties’ submissions. The issues that arise for determination are whether the Subordinate Court had jurisdiction, and if so, whether the Respondents were entitled to the reliefs that they sought.

17.Jurisdiction is an ever present issue in any judicial proceedings. As the Court of Appeal held in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service**

(supra), it is primordial. As has often been restated by the Courts, jurisdiction is the entry point in any matter that a Court is called upon to determine. It is the very life and soul of any proceedings, without which the proceedings come to a certain end. See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** (supra) and **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** (supra).

18. Proceedings conducted without jurisdiction, even if in the lofty intention of doing justice, are akin to drinking from a poisoned well in the hope of quenching biting thirst. They are fatally defective and the outcome is a nullity.

19. The Court of Appeal drove the point home in **National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 Others [2023] KECA 80 (KLR)** where it held:

Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A Court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; (b) the subject matter of the case is within its

jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and, (c) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The three ingredients must co-exist in order to infuse jurisdiction in a Court. Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.

20.As I noted in the opening paragraph of this judgment, the case before the Subordinate Court was filed as an Environment and Land Court case. The heading of the Plaint, which was drawn by the Respondents, expressly proclaimed so. The case was filed before the advent of e-Filing, so the Respondents' advocates on record literally walked to the relevant registry dealing with ELC matters and filed the case there.

21.The jurisdiction of this Court to hear and determine disputes relating to the environment and the use and occupation of and title to land as provided for under **Article 162(2) (b)** of the **Constitution of Kenya** and at **Section 13** of the **Environment and Land Court Act** is extended to the

Subordinate Court through **Section 26 (3) and (4)** of the **Environment and Land Court Act** which provides as follows:

(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.

22. Additionally, **Section 9 (a)** of the **Magistrates' Courts Act** provides:

A magistrate's court shall -

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the

pecuniary limits under section 7(1), 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.

23. In view of the foregoing provisions, there is no doubt that Subordinate Courts presided over by Magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction to hear and determine cases involving occupation of, use and title to land. Having jurisdiction generally is one thing, having jurisdiction in the specific subject matter of a case and ensuring that there is no feature of the case which falls beyond the Court's jurisdiction is an entirely different matter.

24. A reading of the Plaint herein reveals that the thrust of the Respondents' case was that the First Respondent was married to the Appellant and that the marriage was blessed with three children, being the Second to Fourth Respondents. The Respondents were aware that the Appellant denied the alleged paternity, hence their prayer for an order that the Appellant to submit to a DNA test together with the Second to Fourth Respondents.

25. The Respondents did not dispute the Appellant's registered proprietorship of the suit property. Their prayer that the Appellant "allows" them to proceed with construction on the suit property was based on their contention that they were the Appellant's children. In taking that position, they must have been well aware of the legal position that as a registered proprietor of land, the Appellant is entitled to the rights, privileges, and benefits spelt out by the law, ranging from **Article 40** of the **Constitution** to **Section 24** of the **Land Registration Act**. Further, **Section 26** of the **Land Registration Act** obligated the Subordinate Court to accept the Appellant's certificates of title as *prima facie* evidence of proprietorship.

26. The Respondents did not seek nullification of the Appellant's title or any order affecting the proprietorship. They just sought to be "allowed" to proceed with construction on the suit property, on the claim that they were the Appellant's children. Even as they claimed so, they were aware that the paternity

claim had to be established, hence the prayer for a DNA test. Put differently, without paternity the Respondent's claim as pleaded had no foundation. The predominant issue in the case was paternity and marriage as opposed to occupation of, use and title to land.

27. In view of the case filed, the Learned Magistrate was exercising jurisdiction under **Section 26 (3) and (4)** of the **Environment and Land Court Act** and **Section 9 (a)** of the **Magistrates' Courts Act**. The Subordinate Court had no jurisdiction under those provisions, to deal with disputes on paternity and marriage.

28. In view of the foregoing discourse, the answer to the first issue for determination is that the Subordinate Court lacked jurisdiction, and could not therefore hear and determine the case, let alone grant the reliefs sought.

29. I find merit in this appeal, and I therefore allow it. I set aside the judgment of the Subordinate Court and replace it with an order striking out the Respondents' case. Given the circumstances, parties shall bear own costs of both the appeal and of the proceedings in the Subordinate Court.

Dated, signed, and delivered at Nyamira, this 29th day of April 2026.

D. O. OHUNGO

JUDGE

Delivered in the presence of:

Ms Bundi for the Appellants

Mr Mongare for the Respondents

Court Assistant: B Kerubo