Kisuaa & 2 others v Kisanda Kilanda Enterprises (Civil Appeal 428 of 2018) [2023] KECA 373 (KLR) (31 March 2023) (Judgment)

Neutral citation: [2023] KECA 373 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 428 OF 2018

HM OKWENGU, HA OMONDI & JM MATIVO, JJA

MARCH 31, 2023

BETWEEN

LETEIPA ENKEDIENYE OLE KISUAA ..... 1ST APPELLANT

TUPWAI OLE TENKEET ..... 2ND APPELLANT

SOONI OLE TENKEET ..... 3RD APPELLANT

AND

KISANDA KILANDA ENTERPRISES ..... RESPONDENT

(Being an appeal from the entire Judgment and Order of the High Court of Kenya at Nairobi (Onyancha, J.) dated 4th March 2015 and pursuant to leave granted on November 8th 2018 in HCCA No. 863 of 2001 & Civil Application No. 212 of 2018)

JUDGMENT

1. In this appeal, we are first called upon to determine a jurisdictional question, before we can delve into the merits of the appeal. The question is whether the learned Judge of the superior court had jurisdiction to preside over or entertain the proceedings as he was beyond the constitutionally mandated retirement age, and whether the judgment of the superior court (Onyancha, J.) delivered on 12th June, 2000 is a nullity ab initio.

2. The background to this appeal is that the appellants sued the respondent herein in the Land Disputes Tribunal of Narok in Tribunal Case No. 14 of 2001 claiming that there was encroachment into its

parcels of land. After hearing the parties, on 27th February, 2001, the tribunal gave its decision as follows:

> "We therefore rule that this tribunal court together with the Government's offices of the District Registrar of lands and the District Surveyor visit the area to mark these boundaries as well mark the road between parcel No. 80, 81, 82 and 144, 126..."

3. Being dissatisfied with the decision of the Narok Land Disputes Tribunal, the appellants preferred an appeal to the Rift Valley Provincial Land Disputes Appeal Tribunal in Cause No. 6 of 2001 and after the parties were heard, on 7th November, 2001, the panel rendered its verdict which set aside the ruling of Narok District Land Tribunal's decision and held as follows:

> "The Provincial Land Disputes Appeal panel hereby rules that the end point beacon on the road of the land parcels No. 81 and 82 at the swamp is also the end point of land parcels No. 144 and 126 to the original beacon at Enosagaomi River (see attached sketch).
>
> The Provincial Land Disputes Appeal panel therefore orders that the Narok District Surveyor assists the parties identify these aforesaid boundary points in the presence of the two parties..."

4. Aggrieved by the decision of The Provincial Land Disputes Appeal, the respondent preferred an appeal to the High Court vide an amended memorandum of appeal dated 28th July, 2003 complaining, among other things, that The Provincial Land Disputes Appeal Tribunal erred in entertaining the issues of boundaries which affected the ownership of LR. Narok/ Ololulunga/ 144, 126 and 206 because, if the decision of the Provisional Land Dispute Appeal Committee in respect of boundaries was implemented, it would change the original boundaries of the said parcels which would mean that LR. Narok/Ololulunga/144 and 126 would become one parcel and I.R. Narok/ Ololulunga/126 would be where LR. Narok/Ololulunga/206 is situated a process which the Provisional Land Dispute Appeal Committee does not have jurisdiction to undertake under the Land Disputes Tribunal Act No. 18 of 1990 and under section 116 of the *Constitution* of Kenya (Repealed) as the land was adjudicated under the Land Adjudication Act and under the *Registered Land Act* many years ago.

5. The High Court Judge, Onyancha, J. heard that appeal and on 16th November, 2011 by consent the parties agreed that within 60 days the Chief Land Registrar in conjunction with the Narok District Land Surveyor shall establish the boundaries shared by parcels LR. No. Narok/Cis-Mara/ Ololulunga/126/144, 80, and 81, and that a report of finding shall be filed in Court. On 4th March, 2015 the High Court Judge, Onyancha, J. rendered himself as follows:

> "The end result is that this appeal succeeds. The Narok District Land Registrar and Narok District Surveyor, are hereby ordered to visit the two pieces of land aforesaid within 90 days and restore the ground boundary of L.R. Cis-Mara/Ololulunga/144 into parcel L.R. Cis-Mara/Ololulunga/126 by a measurement of 19.42 Hectares following strictly the Registry Index Map used by the District Surveyor and District Land Registrar to draw the plan annexed to the Report filed in court on 19th July, 2014 and dated 12th July, 2014. Orders are made accordingly."

6. Dissatisfied, the appellants moved this Court seeking to have their appeal allowed and the judgment and order of the Superior Court (Onyancha, J.) entirely set aside and *in lieu* thereof an order made dismissing the said Civil Appeal No. 863 of 2001 with costs to the appellants.

7. In their memorandum of appeal dated 21st November, 2018, the appellant has raised fifteen (15) grounds of appeal. In the written submissions, the appellants' counsel Mr. Kinyanjui collapsed the grounds into 4 and these were:

   a. Lack of jurisdiction.

   b. Perverse exercise of discretion.

   c. Taking into consideration extraneous matters.

   d. Res-judicata.

8. The appeal was canvassed via Go-To-Meeting platform through written submissions adopted by learned counsel, Mr. Kinyanjui appearing for the appellants and Mr. Kerongo learned counsel for the respondent.

9. The Court will discuss the grounds as collapsed by the appellant in the submissions dated 11th October, 2019, i.e.

   a. Whether the superior court Judge, (Onyancha, J.) had jurisdiction as a Judge to render any decision after he had attained the constitutionally set retirement age of 70 years.

   b. Whether the learned Judge violated the appellants' Constitutional rights to property by purporting to re-allocate and re-parcel the appellant's property.

   c. Whether the learned Judge erred in law and fact by taking into account extraneous matters that he was neither called upon to decide.

10. On *res judicata*, Mr. Kinyanjui argued that at the nascent of the boundary dispute, the respondent was claiming land under a land buying company called Narok Muoroto Co. Ltd which has mysteriously mutated to the respondent, which is a business name registered in the name of three individuals. Counsel further submitted that the Senior Registrar for the Rift Valley Province accompanied by Superintendent Surveyor and the secretary to the Rift Valley Land Dispute Appeal Tribunal after visiting the area on 16th January, 1996 prepared a report involving LR. No. Cismara/Ololulunga/206, 126, 191, 192, 194, 193, 185, 186, 170, 200 and 201 and in the said report held that the respondent had nonexistent land on the ground. However, the respondents via their company Narok Muoroto Co. Ltd had filed a case in Nakuru HCCC No. 33 of 1996 wherein the court ordered for the determination of boundaries of parcel numbers Narok/Ololulunga/206,194,193,192,169 and 126 within 90 days vide order issued on 12th October, 1999 and it is noteworthy that the parcel 206 claimed by the respondent was subject of the said order. However, there was no mention of the appellant's parcel 144.

11. Counsel contends that the respondent had also an earlier suit Nakuru HCCC 280 of 1982 over the same boundary dispute and which claim was dismissed by Tanui, J. on 6th May, 1993. However, the appellants were never joined in the said suit as a defendant. The respondent appealed the High Court's decision to this Court in Nakuru Civil Appeal No. 140 of 1996; however, the appeal was dismissed on 17th October, 1997. Therefore, the respondent who lost before this Court has reinvented its claim vide the appeal before the superior court which has resulted in the current appeal which is res judicata.

12. On jurisdiction, counsel argued that Onyancha, J. had no jurisdiction as a Judge of the High Court to render any decision as he had already attained the set retirement age of 70 years under Article 167 (1) of the *Constitution* when he sat to adjudicate on the respondent's appeal and hence the judgment rendered on 4th March, 2015 is unconstitutional, null and void, since no court could extend the period within which the said Judge could have adjudicated on any matter beyond the set limit. In support of

his submission, reliance was placed on this Court's decision in *Kalpana H. Rawal, J. v Judicial Service Commission & 3 Others* [2016] eKLR.

13. Counsel further submitted that jurisdiction must be acquired before judgment and it is for that reason that the moment a court determines that it has no jurisdiction it has to down its tools and proceed no further as was held by Nyarangi, JA. in the celebrated case of *Owners of the Motor Vessle M.V. Lilian v Caltex Oil (Kenya) Limited* (1989) KLR.

14. On the issue of perverse exercise of discretion, Mr. Kinyanjui submitted that the learned Judge exercised his discretion wrongly and purported to reallocate and re-parcel the appellants' property, Cismara/Ololulunga/144 and allocating 19.2 Hectares to Cis Mara/Ololulunga/126 belonging to the respondent. To buttress his submission, counsel cited this Court decision in *Kenya Airports Authority v Mitu-bell Welfare Society & 2 Others*, [2016] eKLR where it was held that Courts have no role in the guise of Constitutional interpretation to re- engineer, take away and redistribute property rights.

15. Lastly, on the issue of the learned Judge taking into consideration extraneous matters, counsel for the appellants submitted that the dispute before the learned Judge was a boundary dispute which could not result in the decision to hive off the appellants' land and to accord the same to the respondent. In fact, instead of the learned Judge considering the Narok Land Registrar's report, his focus was on the respondent and he failed to appreciate that there were other parcels in Ololulunga area implicating the claim before him and as a result he arrived at a wrong decision.

16. On the part of the respondent, Mr. Kerongo submitted that the effect of the consent order entered into by the parties before the superior court was that the decision of the Land Disputes Tribunal was reinstated and/or varied. As a result, the appellants are estopped from questioning the capacity and competency of the appeal since the learned Judge only implemented the report which was as a result of the consent. Moreover, there is no appeal against the consent order as adopted by the trial court and a consent having the effects of a contract can only be set aside on the same grounds as for setting aside a contract.

17. Counsel also maintained that in all the proceedings from the Land Dispute Tribunal to the superior court, there has been no doubt about the existence of Cismara/Ololulunga/126 and 144, each title contains acreage on paper which should approximately correspond with the land on the ground as per the limitation and delineation in the various registry index maps which also forms part of titles and the dispute before the superior court was merely a boundary dispute and the report by the Narok Land Registrar and Surveyor. Therefore, the appeal was not about proprietary rights of the parties. It was about fixing the boundaries.

18. On jurisdiction and bias, the respondent's counsel submitted that the issue of jurisdiction was never raised either before and/or during the proceedings. Furthermore, the issue of bias was never raised during the proceedings. Therefore, these issues are being raised for the first time in submissions and they should be treated with the contempt they deserve since they are an afterthought intended delay the determination of this matter.

19. Counsel maintained that the dispute was first recorded in the tribunal in the year 2000 and the matter has been in court for the last 19 years and some parties are of advanced age. However, the appellants herein are in possession of the disputed land and they have continued to enjoy, use and waste the land while the respondent has been kept out due to the prolonged litigation. Therefore, the boundary needs to be fixed as per the known and existing registry index map for litigation must come to an end.

20. Mr. Kerongo in conclusion submitted that the suit in the superior court was not res judicata since the respondent was not a party in Nakuru HCCC 280 of 1982 in Nakuru Civil Appeal No. 140 of

1996 and as a result, the appeal before the superior court was not res judicata. The Court was urged to dismiss the appeal and the parties be allowed to respect the law by living within the boundaries of their respective pieces as demarcated by the Registry index map.

21. This being a second appeal, our jurisdiction is circumscribed by Section 72 of the *Civil Procedure Act* to the consideration of matters of law only. In *Kenya Breweries Ltd v Godfrey Odoyo* [2010] eKLR (Civil Appeal No. 127 of 2007) Onyango Otieno, JA. expressed himself on this point as follows:

> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court in a second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

See also the English case of *Martin v Glywed Distributors Ltd (t/a MBS Fastenings)* 1983 ICR 511 where in, it was held *inter alia* that, where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law.

22. We have carefully considered the record of appeal, the submissions by learned counsel, the authorities cited and the law. It is noteworthy that on 16th November, 2011 the parties entered into a consent which in our view identified the sole issue for determination in the appeal before the superior court was essentially a boundary dispute between parcels No. LR. Number Narok /Cis – Mara/Ololulunga/126 and 144, and as a result the Chief Land Registrar, in conjunction with the Narok District Land Surveyor were to establish the boundaries shared by parcels No. LR. Number Narok/CisMara/ Ololulunga/126, 144, 80 and 88 based on the Registry Index Map, since the boundaries on the ground had been interfered with and it is for that reason that a dispute between the parties arose. Subsequently, the Chief Land Registrar and District Surveyor's report dated 17th July, 2012 was filed in court on 19th July, 2012 and on 12th April, 2013, the superior court ordered parties to file their respective written submissions on the said report. We have therefore framed two issues arising for our determination;

    a. Whether the appellants are entitled to raise the issue of jurisdiction at this stage and if yes, whether the subordinate court had jurisdiction to hear the matter.

    b. Whether the trial Judge erred in law by exercising his discretion wrongly by considered extraneous matter which led to the hiving off of 19 Hectares from the appellants parcel LR. Number Narok /Cis – Mara/Ololulunga 144.

23. We must determine the jurisdictional question first, before we can delve into the merits of this appeal. The question here is whether the appellants are entitled to raise the issue of jurisdiction at this stage and if yes, whether the subordinate court had jurisdiction to hear the matter.

24. The Supreme Court in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2003] eKLR held that a court canP only exercise jurisdiction donated to it by either the Constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See The *Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Limited* (1989) KLR 1.

25. In *Kenya Commercial Bank v Osebe* [1982] KLR 296, it was held that although an appeal must be confined to the points of law raised and determined by the trial court, there were two exceptions to that rule, namely, where the trial court commits an illegality or acts without jurisdiction. In our view, the basis of all these decisions is that jurisdiction flows from the often stated truth that jurisdiction is everything and without jurisdiction, a court must down its tools.

26. This Court's predecessor in *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, quite sufficiently summarized the law on jurisdiction as follows;

    1. .....

    2. The jurisdiction either exists or does not ab initio and the non- constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.

    3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

    4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

    5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.

    6. ..."

27. We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. Consequently, we are satisfied that it is properly before us and no party will be prejudiced.

28. The appellate jurisdiction in matters emanating from Provincial Land Disputes Appeals Tribunals was donated by Section 8(8) and 8(9) of the *Land Disputes Tribunals Act* (repealed). It provided as follows:

> " 8(8) – The decision of the Appeals Committee shall be final on any issue of fact and no appeal shall lie therefrom to any Court.
>
> "8(9) - Either party to the appeal may appeal from the decision of the Appeals Committee to the high court on a point of law within sixty days from the date of the decision complained of:
>
> "Provided that no appeal shall be admitted to hearing by the High Court unless a judge of that court has certified that an issue of law (other than customary law) is involved."

29. It is noteworthy that the appeal from the decision of the Rift Valley Land Tribunal Disputes Appeal Committee lies to the High Court. Therefore, the learned Judge had jurisdiction in accordance with section 8(9) of the *Land Disputes Tribunals Act* (repealed) to entertain the appeal on a point of law.

30. It is noteworthy that the appellants argue that under Article 167(1), the learned Judge attained the age of 70 on 1st December, 2013 having been born on 1st December, 1943. Therefore, the judgment he rendered on 4th March, 2015 was unconstitutional and therefore null and void. However, *vide* petition number 244 of 2014, *Philip K. Tunoi & Another v Judicial Service Commission & another* [2014] eKLR, the learned Judge (Onyancha) and his colleague Judge moved the High Court seeking conservatory orders against the decision by the Judicial Service Commission to retire them at the age

of seventy years. While granting conservatory orders in favour of the learned Judges, Odunga J. (as he was then) in his ruling dated 28th May, 2014 held as follows:

> " It is similarly my view that the respondents ought to "hold their horses" in the meantime. Accordingly, a conservatory order is hereby issued prohibiting the respondents by themselves, their officers, servants or agents or otherwise howsoever from removing and/or retiring the petitioners from service as Judges of their respective Superior Courts pending the hearing and determination of the application inter partes. The costs will be in the cause."

31. The question of one of the petitioners in the above petition sitting as a Judge after already attaining the age of 70 years was raised in the said proceedings and a five judge bench empaneled by the Chief Justice to hear and determine the petition stated:

> " ...In any event, the Petitioners have conservatory orders, and in particular, the 1st Petitioner who sat on the particular Supreme Court bench did so as a beneficiary of the conservatory orders."

32. The five judge bench hearing Petition No. 244 of 2014 rendered its judgment on 11th December, 2015. The effect of the said judgment was that the retirement age of judges serving at the date of the promulgation of the Constitution 2010, was seventy (70) years. The consequence of the foregoing is that the conservatory orders issued on 28th May, 2014 automatically lapsed. The conservatory orders having lapsed, the inevitable conclusion is that the learned Judges who were the beneficiaries of the conservatory orders issued on 28th May, 2014 automatically retired when the said conservatory orders lapsed on 11th December, 2015.

33. Having found that the learned Judges were beneficiaries of conservatory orders issued by the High Court on 28th May, 2014, we find that the judgment rendered on 4th March, 2015 by the learned Judge (Onyancha) was not unconstitutional, null and void as claimed since the effect of the conservatory order meant that the learned judge had the jurisdiction to entertain any matter before him pending the discharge of the conservatory orders issued on 28th May, 2014. In the end, we find that the judgment rendered on 4th March, 2015 was a regular judgment and as a result ground one of the appellants' appeal fails.

34. We now turn to the issue whether the trial Judge erred in law by exercising his discretion wrongly by considering extraneous matters which led to the hiving off of 19 Hectares from the appellants' parcel LR. Number Narok /Cis – Mara/Ololulunga/144. The main concern for this Court is to do justice to the parties. The jurisdiction of this Court to interfere with such exercise of discretionary jurisdiction by an inferior court was succinctly stated by Sir Clement De Lestang, V.P, in the often cited case of *Mbogo v Shah* [1968] EA 93, thus:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

35. Similarly in *United India Insurance Co. Ltd. & 2 others v East African Underwriters (Kenya) Ltd* [1985] eKLR Madan, JA. (as then was rephrased it as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from. The court of appeal is only entitled to interfere if one or more of the following matters are established; first, the Judge misdirected himself in law; Secondly, that he misapprehended the facts; Thirdly, that he took account of considerations of which he should not have taken into account; Fourthly, that he failed to take into account of considerations of which he should have taken account, or Fifthly, that his decision, albeit a discretionary one, is plainly wrong."

36. As earlier stated in this judgment, parties herein had entered into a consent recorded on 16th November, 2011, which consent led to the District Land Registrar and the District Surveyor filing their report dated 12th July, 2012 before the High Court. In the said report Parcel No. 80 recorded acreage is 100 Hectares; Parcel No. 81 recorded acreage is 128.0 hectare; Parcel No. 144 recorded acreage is 169.0 Hectares while Parcel No. 126 recorded acreage is 91.5 Hectares. It is important to mention that the superior court stated that the dispute before it concerned Parcel No. 144 and Parcel No. 126 and as a result, Parcel No. 80 and 81 were not relevant to the dispute before him.

37. From the foregoing we find that the appellants have not demonstrated how the superior court abused its discretion only dealing with a boundary dispute between the parties that were before him. In our view, it would fly in the face of the rules of natural justice if the superior court had gone ahead to determine a boundary dispute involving Parcel No. 80 and 81 in the absence of the proprietors.

38. We also find that the report dated 12th July, 2012 found that Parcel Narok /Cis- Mara/Ololulunga/144 had all its four beacons in all corners on the ground but it also overlaps into Narok/Cis-Mara/Ololulunga/126 leaving it with a small portion on the ground. We note that the learned Judge of the superior court stated that the District Land Registrar and Surveyor chose not to state with accuracy, the extent of the overlap by Narok/Cis-Mara/Ololulunga/144 onto Narok /Cis-Mara/Ololulunga/126. Consequently, the overlap of 19.4 Hectares is derived from the respondent's counsel oral and written submissions.

39. The learned trial Judge held as follows:

> " As earlier stated, the parties and indeed this Court recognized the fact that the dispute between the two parties owning the two registered and directly neighbouring parcels of land is a boundary dispute. They recognized the dispute and recorded the issue in a consent order which this court recorded on 16th November, 2011, ordering the Chief Land Registrar and the District Surveyor of Narok to go to the two pieces of land and establish the legitimate boundary between them. In the view and finding of the court, that establishment was accomplished. That is to say, the Registrar and Surveyor took measurements and fixed the positions of the present boundaries of the two pieces of land, thereby confirming in their report above cited that Parcel L.R. Cis- Mara/Ololulunga/144 is overlapping into L.R. Cis-Mara/Ololulunga/126."

40. We find that the decision by the superior court to hold that Parcel L.R. Cis- Mara/Ololulunga/144 was overlapping into L.R. Cis-Mara/Ololulunga/126 to a tune of 19.4 Hectares as derived from the respondent's counsel oral and written submission, albeit a discretionary one, was plainly wrong and the learned Judge misdirected himself in law. Reason being that submissions can never take the place of evidence and therefore, the learned Judge erred when he picked the figure of 19.4 Hectares in the

respondent's submission and ran away with that figure that did not emanate from the evidence that was before him as a result of a consent adopted on 16th November,2011. See in *Avenue Car Hire & Another vs. Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997 where this Court held that no judgment can be based on written submissions and that such a judgment is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the *Civil Procedure Rules* [now Order 18 rule 2 of the Civil Procedure Rules].

41. Additionally, we find and hold that it would have been prudent for the learned Judge having found that Parcel L.R. Cis-Mara/Ololulunga/144 is overlapping into L.R. Cis Mara/Ololulunga/126, he ought to have gone ahead and called for additional evidence from the Chief Land Registrar and the District Surveyor of Narok in order to establish the exact extent of the overlap the appellants parcel L.R. Cis-Mara/Ololulunga/144 had overlapped into the respondent's L.R. Cis Mara/Ololulunga/126, rather than relying on the evidence introduced by the respondent by way of submissions.

42. The upshot of the foregoing is that we allow this appeal and set aside the High Court decision and remit the appeal back to the Environment and Land Court for it to determine the exact extent of which Parcel L.R. Cis- Mara/Ololulunga/144 overlaps into L.R. Cis Mara/Ololulunga/126. Since the appeal has been partially successful, each party should bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR