



REPUBLIC OF KENYA



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Njuguna v Housing Finance Company of Kenya Limited & another (Civil Appeal 249 of 2018) [2023] KECA 1569 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KECA 1569 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 249 OF 2018
DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA
JUNE 22, 2023**

BETWEEN

PAUL KARUGA NJUGUNA APPELLANT

AND

PENINAH NJERI HASSAN 1ST RESPONDENT

HOUSING FINANCE COMPANY OF KENYA LIMITED 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court at Nairobi (Ochieng, J. (as he then was) dated 18th August 2016 in Nairobi Civil Suit No. 506 of 2008)

JUDGMENT

1. Before this Court is an appeal from the judgment and decree of the High Court dated 18th August 2016 in *Nairobi Civil Suit No. 506 of 2008*.
2. The appellant's case was that he was the registered owner of a property known as Dagoretti/Riruta/S.272 (hereinafter referred to as "the suit property"), and had charged it to the 1st respondent as security for a loan of Kshs.2,000,000/= by a charge dated 5th November 1999.
3. The appellant defaulted in repaying the loan facility as a result of which the 1st respondent sought to realize the security by issuing a demand notice dated 5th December 2005 and, later, a redemption notice dated 8th May 2006. The 1st respondent eventually issued a notification of sale on 30th March 2007, setting the sale for 20th April 2007.
4. The appellant pre-emptively filed suit at the Magistrates' Court, to wit, Milimani CMCC No. 3164 of 2007, against the 1st respondent ostensibly seeking to stop the planned sale of the suit property. Contemporaneous with the suit, the appellant filed an application dated 16th April 2007 seeking an



injunction to halt the sale of the suit property by way of auction set for 20th April 2007. On 25th May 2007, D. A. Okundi (Senior Resident Magistrate), issued the following orders:

“It is noted that the suit property has a value of more than 2 million Kenya Shillings. This court lacks the necessary pecuniary jurisdiction to entertain any matters herein. The application dated 16th April, 2007 is thus stood over to 4th July, 2007 by consent. The file to be placed before the Chief Magistrate. Status quo to be maintained.”

5. The appellant’s application dated 16th April 2007 would later be dismissed by M. Odera (Ag. Chief Magistrate) vide a ruling dated 19th July 2007. The appellant had filed an appeal against the ruling, to wit, High Court Civil Appeal No. 656 of 2007, which he discontinued through a Notice of Discontinuance of Suit dated 19th August 2008 brought under the provisions of Order XXIV rule 1 of the *Civil Procedure Rules*.
6. The appellant instituted a fresh suit against the respondents at the High Court, to wit, High Court *Civil Suit No. 506 of 2008*. In his pleadings, he contended that in spite of the court order issued by the Subordinate Court on 25th May 2007, the 1st respondent proceeded to advertise the suit property for sale, which advertisement indicated that the sale was scheduled for 22nd June 2007.
7. The appellant stated that he lodged a protest and served the 1st respondent with a copy of the order issued by the Subordinate Court maintaining the status quo. He stated that when the application came up for inter partes hearing on 4th July 2007, the court extended the interim orders on maintenance of the status quo up to 18th July 2007.
8. According to the appellant, he had no reason to believe the property had been sold until he received a letter dated 1st July 2007 from the 1st respondent informing him that the property had been sold on 22nd June 2007 for Kshs.3,800,000/=. The appellant contended that the sale was in contempt of the court order in force at the time of the sale; and that the sale was done behind his back in an opaque manner, thus depriving him of his right of redemption.
9. The suit property was transferred to the 2nd respondent on 18th December 2007 and, on the same day, a charge was registered, whereby the 2nd respondent charged it to the 1st respondent to secure a sum of Kshs.1,700,000/=.
10. The appellant further contended that the sale and transfer did not comply with the terms and conditions of sale, which stated that the purchaser was due to pay 25% of the purchase price upon the fall of the hammer and, thereafter, pay the balance within 30 days of the auction. The appellant contended that by allowing the 2nd respondent to pay the balance after the lapse of 6 months, the 1st respondent introduced a fundamental change to the Conditions of Sale beyond the contemplation of the appellant; and that, if other bidders were aware of this change, the price obtained would have been higher than Kshs.3,800,000/= and closer to the valuation of Kshs.4,200,000/=.
11. The appellant also contended that the registration of the 2nd respondent as owner of the suit property was fraudulent in that the 1st respondent was aware of the court order directing maintenance of status quo when it advertised and purportedly sold the property; that the purported sale did not comply with the Conditions of Sale; the purported sale was made at an undervalue of the property; and that the purported sale was not transparent and was in bad faith.
12. He sought a declaration that the sale of the suit property by the 1st respondent to the 2nd respondent was null and void; that the registration of the 2nd respondent as proprietor of the suit property be cancelled



- and rectified to reflect the appellant as the owner; an injunction restraining the 2nd respondent from evicting the appellant or dealing with the suit property; costs and interest.
13. In its defence, the 1st respondent stated that the Subordinate Court in CMCC 3164 of 2007 lacked jurisdiction and could not give any orders capable of restraining it from exercising its statutory power of sale. It averred that the status quo at the time of the issuance of the order on 25th May 2007 was that it had commenced the realization of the charged property following default in payment by the appellant. It denied that it had consented to suspend the sale pending the hearing of the appellant's application. It was further contended that the sale of the property to the 2nd respondent was done within legal limits and in the full knowledge of the appellant.
 14. In her defence and counterclaim, the 2nd respondent stated that she was a bona fide purchaser for value; that the public auction was in accordance with the provisions of section 77 of the Registered Land Act and, therefore, did not contravene the law; and that the appellant's equity of redemption was extinguished when the property was sold by public auction. In her counterclaim, she reiterated that she was now the registered and absolute owner of the suit property, and prayed for orders dismissing the appellant's suit against her, and that the appellant be compelled to give vacant possession of the suit property and, in default, he be evicted therefrom.
 15. After a full hearing, the trial court delivered judgment on 18th August 2016. The salient findings of the court were as follows:
 - a. There was no valid court order in CMCC No. 3164 of 2007 which could have stopped the 1st respondent from realizing the security. The court had declared that it lacked jurisdiction. Therefore, it had no legal capacity to give any lawful order.
 - b. Clause 10 (iii) (a) of the Charge Instrument gave the 1st respondent authority to sell the property by public auction and private treaty; and to vary any contract of sale. The appellant could not complain that the variation of the period within which the balance of the purchase price was unlawful or irregular.
 - c. The sale price was not so inordinately low, so as to amount to a fraud on the appellant. The appellant's valuer expressly conceded he was unable to state whether or not the sale price was either low or high.
 - d. The appellant had not demonstrated any particular criteria which the sale failed to meet so as to be said to have failed the test of a sale by public auction.
 - e. The appellant had not proved the lack of good faith; the sale was made in good faith as stipulated by statute.
 - f. The 1st respondent's conduct in selling the suit property and then subsequently financing the 2nd respondent to purchase the same was not improper as it constituted a variation of the contract of sale, as had been envisaged and authorized in the Charge Instrument.
 16. The court therefore dismissed the appellant's claim and held that the 2nd respondent's counterclaim was merited. The appellant was ordered to hand over vacant possession of the suit property to the 2nd respondent.
 17. Aggrieved and dissatisfied by the decision of the trial court, the appellant preferred this appeal. In his memorandum of appeal dated 23rd July 2018, he argued that the learned judge erred by, inter alia, holding that there was no court order when the property was sold by public auction as it failed to take into consideration that the court order issued on 25th May 2007 was in fact a consent order which



was a mutual contractual agreement between the parties and not an order delivered by the court in the process and in exercise of its judicial function; in retrospectively applying his finding that there was no valid court order when the sale took place to relieve the 1st respondent of its obligation to obey an order made by a court with or without jurisdiction; holding that the bank varied the period within which the balance of the purchase price was payable yet none of the respondents pleaded this; in failing to identify the amended terms and variations thereto; in holding that the appellant did not plead collusion between the 1st and 2nd respondents yet the appellant did so in its reply and defence to the 2nd respondent's counterclaim; and in failing to take into account that the 2nd respondent did not have the balance of the purchase price and the finding that the 1st respondent subsequently financed the 2nd respondent to purchase the property in determining whether or not the terms of the sale by public auction were complied with.

18. At the hearing of this appeal, learned counsel, Mr. Mwathe, held brief for Mr. Kibe Mungai for the appellant. There was no appearance on behalf of the 1st and 2nd respondents. Learned counsel indicated that the appellant would be relying wholly on his client's written submissions without the need of making any oral highlights. However, the appellant's written submissions could not be traced either in the physical file or in the Case Tracking System (CTS). The Court through its registry requested the advocates for the appellant to avail the written submissions which they did not. This Court has therefore not had sight of the appellant's written submissions.
19. The 1st respondent did not file any written submissions. The only written submissions on record are those filed by the 2nd respondent which are dated 2nd September 2020. The crux of the written submissions by the 2nd respondent is on the issue of jurisdiction. It is submitted that, from the evidence and facts on record, the subordinate court lacked jurisdiction to issue an order purporting to stop the 1st respondent from exercising its right to a statutory power of sale. Consequently, any orders issued by the subordinate court were a nullity in law and could not in essence purport to bar the 1st respondent from exercising its statutory power of sale. Reliance was placed on the Supreme Court decision in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. The 2nd respondent also relied on the decision of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* [1989] eKLR in support of her argument that, without jurisdiction, the subordinate court ought to have downed its tools, and that a decision made without jurisdiction amounts to nothing.
20. This being a first appeal, our mandate is clearly set out in rule 31(1) (a) of the *Court of Appeal Rules*:

“On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-

 - a. to re-appraise the evidence and to draw inferences of fact.”
21. Although the appellant raised various issues for our determination, this appeal turns on the question as to whether the subordinate court, having declared its lack of pecuniary jurisdiction, could have given any valid orders restraining the 1st respondent from exercising its statutory power of sale. The High Court held that the subordinate court, having declared that it lacked the requisite pecuniary jurisdiction, it had no legal capacity to give any lawful orders.
22. The germane argument by the appellant is that the court order issued on 25th May 2007 was a consent order which was a mutual contractual agreement between the parties, and not an order delivered by the court in the process and in exercise of its judicial function.



23. To determine the question of jurisdiction, it is imperative that we advert to the Supreme Court decision in *Republic v. Karisa Chengo & 2 others* [2017] eKLR where the Court stated:

“... we note that in almost all the legal systems of the world, the term “jurisdiction” has emerged as a critical concept in litigation. *Halsbury’s Laws of England* (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as

“... the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.”

John Beecroft Saunders in his treatise *Words and Phrases Legally Defined* Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

From these definitions, it is clear that the term “jurisdiction”, as further defined by *The Black’s Law Dictionary*, 9th Edition, is

“the Court’s power to entertain, hear and determine a dispute before it.”

24. Courts have, in a plethora of decisions, held that jurisdiction is what grants a court or a tribunal the power, authority and legitimacy to entertain a matter before it. In the celebrated decision of this Court in *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* (*supra*), Nyarangi, J.A. held as follows:

“... 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 pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

25. In *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Limited & 2 Others* (*supra*), the Supreme Court held that:

“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 by law.”

26. Jurisdiction, therefore, is the hallmark of judicial authority, and any decision made by a court of law without jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.



- 27. It is trite law that a court without jurisdiction cannot hear a matter. The court downs its tools in respect of the matter before it the moment it holds the position that it is without jurisdiction. In the circumstances of this appeal, the subordinate court vide the court order issued on 25th May 2007 held that it did not have the requisite pecuniary jurisdiction. Having made such a finding, the court ought to have downed its tools. Despite holding that it lacked pecuniary jurisdiction, the court still went ahead to order maintenance of the status quo.
- 28. In our view, the subordinate court was bereft of jurisdiction to issue any further orders, having returned a finding, and rightly so, that it lacked the necessary pecuniary jurisdiction. The argument by the appellant that the order of maintenance of status quo was a consent order as opposed to an order delivered by the court in the exercise of its judicial functions is devoid of any merit. In Equity Bank Limited v. Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR this Court held:

“It is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists.”
- 29. We are therefore in full agreement with finding of the High Court that there was no valid court order in CMCC No. 3164 of 2007 that could have stopped the 1st respondent from realizing the security. The subordinate court, having declared that it lacked jurisdiction, had no legal capacity to give any lawful order. It ought to have struck out the suit in CMCC No. 3164 of 2007.
- 30. In the upshot, therefore, having determined the question of jurisdiction as herein above, it would be otiose to determine any other issue. This appeal is accordingly dismissed with costs to the 2nd respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY JUNE, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original
signed

DEPUTY REGISTRAR

