



**Zacharia Baraza t/a Siuma Actioneers & 3 others v Kombe &  
another (Environment and Land Appeal E057 & E077 of 2023  
(Consolidated)) [2024] KEELC 3623 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3623 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT AND LAND APPEAL E057 & E077 OF 2023 (CONSOLIDATED)**  
**EK WABWOTO, J**  
**APRIL 30, 2024**

**BETWEEN**

**ZACHARIA BARAZA T/A SIUMA ACTIONEERS ..... 1<sup>ST</sup> APPELLANT**

**LINDA KASICHAN KUPALIA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MASUMBUKO YERI KOMBE ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**ENVIRONMENT AND LAND APPEAL E077 OF 2023**

**BETWEEN**

**ZACHARIA BARAZA T/A SIUMA ACTIONEERS ..... 1<sup>ST</sup> APPLICANT**

**LINDA KASICHAN KUPALIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MASUMBUKO YERI KOMBE ..... RESPONDENT**

*(Being an Appeal against the Ruling of Honourable B. M.  
Cheloti (PM) delivered on 12th June 2023 in Misc. E551 of 2023)*

**JUDGMENT**

1. This Judgment is in respect to the consolidated appeals; ELC Appeal No. E057 of 2023 Zacharia Baraza T/A Siuma Auctioneers & Another v Masumbuko Yeri Kombe and ELC Appeal No. E077 of 2023 Linda Kasichana Kupalia v Masumbuko Yeri Kombe and Another.



2. The consolidated appeals are against the orders and ruling issued by Hon. B. M. Cheloti, Principal Magistrate on 12<sup>th</sup> June 2023. The learned Magistrate granted the following orders in respect to the application dated 2<sup>nd</sup> May 2023: -
  - a. That the preliminary objection dated 11<sup>th</sup> May 2023 and 12<sup>th</sup> May 2023 respectively are both struck out for lack of merit.
  - b. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are restrained either by themselves, their assigns, agents, servants or any other persons acting under their authority from proclamation, further proclamation, carting away, further carting away, sale, disposal, alienating, transferring or in any manner whatsoever interfering with property listed in the proclamation and notices of sale of movable property dated 26<sup>th</sup> April 2023 and/or any other property owned by or in possession of Masumbuko Yeri Kombe.
  - c. That orders issued on 18<sup>th</sup> April 2023 ordering OCS Karen Police Station to supervise distress or further distress for rent against the Applicant on property L.R No. 12832/5 Woodside Villas Karen are hereby set aside.
  - d. ....
  - e. ....
3. The Appellant in ELCA No. 57 of 2023 being aggrieved by said ruling filed an Amended Memorandum of Appeal dated 15<sup>th</sup> August 2023. The Amended Memorandum had the following grounds;
  - i. The Learned Magistrate misdirected herself on the law when she failed to appreciate that having issued the Orders as she did on 18<sup>th</sup> April 2023, the Subordinate Court became/was functus officio and no further action and or proceedings could ensue thereafter.
  - ii. The Learned Magistrate misdirected herself on the law by setting aside the Orders issued on 18<sup>th</sup> April 2023 for Police assistance after the said Orders had been executed and spent.
  - iii. By purporting and indeed setting aside the orders of 18<sup>th</sup> April 2023, the Learned Magistrate erred in law by sitting on appeal on her own orders of 18<sup>th</sup> April 2023 resultant of which she made orders beyond her jurisdiction.
  - iv. The Learned Magistrate misdirected herself on the law by setting aside the orders that had already been executed and spent thus acting in contrary to the trite axiom; the Court cannot stay an order that had already been executed and spent.
4. The Appellant sought for the following orders; that the appeal herein be allowed, that the Ruling and Orders issued on 12<sup>th</sup> June 2023 be set aside in their entirety and also costs of the Appeal.
5. In ELC Appeal No. E077 of 2023, The Appellant filed a Memorandum of Appeal dated 29<sup>th</sup> June 2023 which Memorandum of Appeal raised the following 18 grounds: -
  1. That the Learned Magistrate misdirected herself on the law when she failed to appreciate that the file at the Magistrate's Court was opened under the special provision of Rule 9 of



the Auctioneers Rules, 1997 and was specific to the Miscellaneous Application field therein seeking police assistance.

2. That the Learned Magistrate misdirected herself on the law when she failed to appreciate that having issued the Orders as she did on 18<sup>th</sup> April 2023, the Court was functus officio and no further action could obtain.
3. That the Learned Magistrate erred in law by granting final orders in respect of the Application dated 2<sup>nd</sup> May 2023 such that by dint of those orders, there is nothing left for determination in the said Application.
4. That the Learned Magistrate grossly erred in law by the issuing orders restraining the Appellant and 2<sup>nd</sup> Respondent from proclamation, further proclamation, carting away/further carting away or sale of the property listed in the proclamation and notification of sale dated 26<sup>th</sup> April 2023 in perpetuity. Thus, in effect, acting in a manner that is affront to the Appellant's right to levy distress for rent under the *Distress for Rent Act*.
5. That the Learned Magistrate misguided herself in setting aside the Orders issued on 18<sup>th</sup> April 2023 for police assistance after it had already been executed as the same is erroneous and legally untenable for the obvious reason of its execution.
6. That the Learned Magistrate had no powers to issue the orders setting aside the Order issued on 18<sup>th</sup> April 2023 neither did she have powers to issue orders restraining the Appellant and 2<sup>nd</sup> Respondent from proclamation, further proclamation, carting away/further carting away or sale of the property listed in the proclamation and notification of sale dated 26<sup>th</sup> April 2023 as she did in the impugned Ruling as the Ruling was on the Preliminary Objections dated 11<sup>th</sup> May 2023 and 12<sup>th</sup> May 2023.
7. That the Learned Magistrate erred in law in sitting on appeal on her own Orders of 18<sup>th</sup> April 2023 thus making orders which were beyond her jurisdiction.
8. That the Learned Magistrate erred in law and fact in allowing and giving substantial orders in respect of the Application dated 2<sup>nd</sup> May 2023 against the Appellant and 2<sup>nd</sup> Respondent without giving them a chance to be heard.
9. That the Learned Magistrate erred in law and fact in overstepping her mandate and acting unlawfully when she issued Orders outside the purview of the Preliminary Objections dated 11<sup>th</sup> May 2023 and 12<sup>th</sup> May 2023 thus negating the need for a hearing on the Application dated 2<sup>nd</sup> May 2023.
10. That the Learned Magistrate erred in law and in fact by failing to find that the Court was functus officio when it granted the orders sought in the Miscellaneous Application dated 14<sup>th</sup> April 2023 seeking orders for police assistance in respect of the distress for rent levied by the 2<sup>nd</sup> Respondent on behalf of the Appellant herein.
11. That the Learned Magistrate misguided herself in finding that she has jurisdiction to hear and determine the Application dated 2<sup>nd</sup> May 2023 even though the Court was functus officio in respect of the Miscellaneous Application dated 14<sup>th</sup> April 2023 that instituted the suit and for which Application the Court had granted the orders sought vide Orders issued on 18<sup>th</sup> April 2023.



12. That the Learned Magistrate erred in law and in fact when she found that she has jurisdiction to hear and determine the Application dated 2<sup>nd</sup> May 2023 seeking to restrain the sale of the goods attached even though the proclamation notice leading to the levying of distress has never been objected to and/or challenged.
  13. That the Learned Magistrate erred gravely in granting the interim orders as per her Ruling and Orders despite the glaring fact the orders sought to be restrained had already been executed and thus fully discharged.
  14. That the Learned Magistrate misguided herself in staying the orders of police assistance that had already been executed contrary to the axiom that the Court cannot stay an order that had already been executed neither can it issue Orders in vain.
  15. That the Magistrate acted outside her judicial mandate and hampered the Appellant's exercise of her rights as a landlord when she unlawfully interfered with the process of levying distress under the *Distress for Rent Act*.
  16. That the Learned trial Magistrate was sketchy and did not deal with the issues raised in the Preliminary Objections dated 11<sup>th</sup> May 2023 and 12<sup>th</sup> May 2023 conclusively and, in a manner, required of a magistrate.
  17. That the learned trial Magistrate was completely biased against the Appellant.
  18. That the Learned Magistrate erred in law and in fact in making a decision that was wholly against the weight of the evidence that had been adduced.
6. The following orders were sought: -
1. That the Appeal herein be allowed.
  2. That the Ruling and Orders issued on 12<sup>th</sup> June 2023 be wholly set aside and vacated.
  3. That such further or other Order be made by the Honourable Court as it may deem fit and just to grant.
  4. That the Appellant be awarded costs of the Appeal.
7. Before the hearing and disposal of the Appeal the Respondent Masumbuko Yeri Kombe filed an application dated 11<sup>th</sup> July 2023 seeking to cite the Appellants for contempt of court against the orders issued by this Court.
  8. The Appeal was canvassed by way of written submissions. The Appellants filed written submissions dated 29<sup>th</sup> June 2023 in respect to the Appeal and written submissions dated 31<sup>st</sup> January 2024 in respect to the contempt application dated 11<sup>th</sup> July 2023.
  9. The Respondent filed written submissions dated 18<sup>th</sup> October 2023 in respect to the Appeal.
  10. The Appellants submitted on the following issues; whether the Learned Magistrate was functus officio after issuing the orders of 18<sup>th</sup> April 2023, whether the Learned Magistrate had jurisdiction to issue orders outside the scope of the Preliminary Objections, whether the Learned Magistrate infringed on the Appellant's right to fair hearing by making substantive orders on 12<sup>th</sup> June 2023 and whether there was contempt of court order.
  11. It was argued that a Miscellaneous application is filed to initiate proceedings seeking a specific relief and nothing more and that the application filed by the 1<sup>st</sup> Appellant at the lower court only sought



- a specific relief which was an order of police assistance in levying distress. It was submitted that the Learned Magistrate erred in law by misdirecting herself on the import of Rule 9 of the Auctioneers Rules 1997 and issuing orders that were extraneous to this particular power. Any other issue arising out of the orders issued on 18<sup>th</sup> April 2023 and/or any other orders sought ought to have been canvassed in a separate suit filed together with an attendant application and not within the Miscellaneous Application contemplated under Rule 9 of the Auctioneer Rules.
12. It was also submitted that since the orders issued on 18<sup>th</sup> April 2023 were neither set aside nor varied at the time of proclamation, the proclamation notice remained valid, legal and procedural. It was submitted that the court thus became functus officio. The following cases were cited in support of that position; *Namu Wachira & 2 Others =Versus= Njeru Wachira* (2015) eKLR, *Musa Cherutich Sirma =Versus= Jone Nduta Kiguru & Another* (2020) eKLR, *Kang'ether =Versus= Mumo (Sued on behalf of John Mutisya Mumo)* (Environment & Land Case 967 of 2014) (2022) KEELC 2434 (KLR), *Telkom Kenya Ltd =Versus= John Ocbada* (2014) eKLR.
  13. On whether the Learned Magistrate had jurisdiction to issue substantive orders outside the scope of the Preliminary Objection, it was submitted that the court acted ultra vires by issuing orders outside the four corners of the Appellant's Preliminary Objections as required by law. The court lacked jurisdiction to issue such orders and ought to have downed its tools as was held in the case of *Owners of the Motor Vessel "Lillian" S =Versus= Caltex Oil (Kenya) Ltd* (1989) eKLR.
  14. On whether the Learned Magistrate infringed on the Appellants right to a fair hearing by making substantive orders on 12<sup>th</sup> June 2023, it was submitted that the Learned Magistrate first issued interim orders in respect to the Respondent's application on 4<sup>th</sup> May 2023 which orders were made final on 12<sup>th</sup> June 2023 without according the 2<sup>nd</sup> Appellant an opportunity to be heard. Reliance was placed to the provisions of Article 50(1) of *Constitution* and the cases of *Pinnacle Projects Limited =Versus= Presbyterian Church of East Africa, Ngong Parish & Another* (2019) eKLR and *Karani =Versus= Judicial Service Commission* (Petition No. 3 of 2021).
  15. The 2<sup>nd</sup> Appellant concluded her submissions by urging the court to allow the Appeal and set aside the Ruling and Orders issued on 12<sup>th</sup> June 2023.
  16. The Respondent submitted on the following issues in his submissions dated 18<sup>th</sup> October 2023; whether this court has jurisdiction to entertain the instant suit and whether the suit is bad, incompetent, vexatious, frivolous and scandalous, lacks bona fides and is hopeless, annoying and offensive.
  17. Citing the cases of *Samuel Kamau Macharia & Another =Versus= Kenya Commercial Bank Limited & 2 Others* (2012) eKLR and in *The Matter of the Interim Independent Electoral Commission* (2011) eKLR it was submitted that this court lacks jurisdiction to entertain this matter by dint of Section 75 of the *Civil Procedure Act*. It was submitted that the orders sought are nothing capable of being granted for the reasons that the Appellant did not seek leave from the Court of Appeal (sic) on the orders issued in Miscellaneous Application No. E551 of 2023 *Zacharia Baraza & Linda Kasichana =Versus= Masumbuko Yeri Kombe*.
  18. It was also argued that the Appeal herein was time barred and further it was filed in the Environment and Land Court which lacks jurisdiction to consider the same.
  19. The Court has considered the record of Appeal. The Court has also considered the written submissions filed and the itemized grounds of appeal. In determining the issues raised in the Appeal this court is cognizant of its duty on a first appeal as set out in the case of *Selle & Another -v- Associated Motor Boat*



*Co. Ltd & others* (1968) EA 123 cited with approval in [China Z Hogxing Construction Company Ltd -v- Ann Akeru Sophia](#) (2020) eKLR.

20. The Court is of the view that the following are key issues for determination by this Court which can dispose of the appeal. These are:-
- i. Whether this court has jurisdiction to hear this Appeal.
  - ii. Whether the Learned Magistrate was functus officio after issuing the Orders of 18<sup>th</sup> April 2023.
  - iii. Whether the Learned Magistrate infringed on the Appellants' right to fair hearing by issuing orders on 12<sup>th</sup> June 2023.
  - iv. Whether the Appellants are in contempt of the Orders issued on 29<sup>th</sup> June 2023.

### **Issue No. 1**

#### **Whether this court has jurisdiction to hear this Appeal.**

21. Jurisdiction is everything. The issue of jurisdiction having been raised by a party should be determined at the earliest possible opportunity. This is because jurisdiction is the lifeline of a case and without jurisdiction, a Court ought to down its tools. See [Owners of the Motor Vessel "Lillian SS" v Caltex Oil Kenya Limited](#) (1989) KLR 1. A Court's jurisdiction flows from either [Constitution](#) or legislation or both. The Supreme Court in *The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011* discussed the issue of jurisdiction in the following manner:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by [Constitution](#) ; by statute law, and by principles laid out in judicial precedent.... the Lillian "SS" case establishes that jurisdiction flows from the law, and the recipient, the Court, is to apply the same with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation or by way of endeavours to discern or interpret the intentions of Parliament where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court their respective jurisdiction is donated by [Constitution](#) ”.

22. The Respondent argued that the Appeal had been filed in the wrong court since the same emanated from Milimani Commercial Court. It was also argued that the court lacks jurisdiction to entertain these Appeals by dint of the operation of Section 75 of the [Civil Procedure Act](#) and Order 43 Rule 3 of the [Civil Procedure Rules](#), 2010.
23. The orders and Ruling being appealed against were made pursuant to an application brought under Order 42(1) and Order 51(1) of the [Civil Procedure Rules](#). Order 42 deals with powers relating to appeals while Order 51 deals with applications. A keen perusal of the said provisions does not expressly bar a party from appealing against any of the orders or ruling that may be issued in respect of the same. The court is also of the view that it has jurisdiction to hear any appeals arising from subordinate court and or Tribunal in respect to environment and land. In view of the foregoing the Respondents contention that this court lacks jurisdiction to hear and determine these Appeals fails.



## **Issue No. II**

### **Whether the Learned Magistrate was functus officio after issuing orders of 18<sup>th</sup> April 2023.**

24. The Appellants submitted that the 1<sup>st</sup> Appellant had filed an application on 14<sup>th</sup> April 2023 seeking police assistance in distressing for rent and obtained the order on 18<sup>th</sup> April 2023 consequent to which the 1<sup>st</sup> Appellant proclaimed the property of the Respondent. It was further submitted that these orders were executed when the police offered their assistance as directed by the lower court. The Orders having been executed there was nothing remaining for the court to do.
25. The proceedings before the lower court were instituted vide a Miscellaneous Application filed pursuant to Rule 9 of the Auctioneer Rules of 1997. From the Record of Appeal, the court considered the said application and granted orders on 18<sup>th</sup> April 2023 which were executed.
26. As submitted by the Appellants it is indeed trite law that a Miscellaneous application is always filed to initiate proceedings seeking a specific relief and nothing more. The application before the lower court sought for orders of police assistance and the same having been disposed off and the orders issued having been executed there were no further proceedings that could be entertained by the court. Once the Learned Magistrate rendered her decision and the orders were executed the proceedings in the Miscellaneous application came to a halt. There was nothing pending. The court was functus.
27. In view of the foregoing, it is the finding of this court that the lower court had exhausted its mandate under the provisions of Rule 9 of the Auctioneer Rules and could not purport to issue any further orders. The lower court erred in law by making extraneous orders notwithstanding that it was functus.

## **Issue No. III**

### **Whether the Learned Magistrate infringed on the Appellant's right to hearing by issuing orders of 12<sup>th</sup> June 2023.**

28. The Appellant submitted that the Learned Magistrate first issued interim orders in respect of the Respondent's application on 4<sup>th</sup> May 2023 which orders were made final vide Ruling delivered on 12<sup>th</sup> June 2023 and that the said orders were made final without affording the 2<sup>nd</sup> Appellant an opportunity to be heard.
29. The court has perused the Record of Appeal filed herein, which records shows that whereas the court issued ex parte interim orders in respect to the application dated 2<sup>nd</sup> May 2023, it directed the same be served and subsequent to the said service there were further proceedings in respect to the same on 12<sup>th</sup> May 2023. On 12<sup>th</sup> May 2023, there was representation for the 2<sup>nd</sup> Appellant and the court directed the parties to file submissions in respect to the Preliminary Objections within 14 days. The matter was later mentioned on 30<sup>th</sup> May 2023 when counsel for the 2<sup>nd</sup> Appellant confirmed having filed their written submissions in respect to their Preliminary Objection. The court then proceeded to reserve a Ruling date for 9<sup>th</sup> June 2023 which Ruling was later delivered on 12<sup>th</sup> June 2023.
30. In view of the foregoing, it is the finding of this court that the 2<sup>nd</sup> Appellant was indeed granted an opportunity to be heard and there is no evidence that there was any infringement of their right to be heard.



## Issue No. IV

### Whether the Appellants are in contempt of the court orders issued on 29<sup>th</sup> June 2023.

31. The last issue for determination is whether the Appellants are in contempt of the Orders issued on 29<sup>th</sup> June 2023. On 29<sup>th</sup> June 2023 this court issued several orders including inter alia staying the proceedings in Milimani CM Misc E551 of 2023 *Zachary Barasa t/a Siuma Auctioneers & Linda Kasichana =Versus= Msumbuko Yeri Kombe*.
32. The Appellants in contesting the same submitted that the 2<sup>nd</sup> Appellant did not contravene the said orders because Justice M. D. Mwangi had issued orders staying all proceedings before the consolidation of the Appeals and as such the 2<sup>nd</sup> Appellant did not at all contravene any court order nor acted in wilful defiance of any orders of this court.
33. It is trite law that to succeed in an application for contempt, the applicant must demonstrate wilful disobedience and the order said to have been disobeyed must be clear enough to leave no doubt as what is to be done or refrained from. See *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others* [2018] eKLR.
34. An allegation of contempt of court is a serious matter since it puts the liberty and or property of the contemnor at grave risk. It is for that reason that the standard of proof in contempt proceedings is higher than the usual one in civil proceedings of proof on a balance of probabilities. See *Mutitika v. Babarini Farm Limited* [1985] KLR 229 and *Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others* [2018] eKLR.
35. From the evidence on the Record of Appeal filed herein the 2<sup>nd</sup> Appellant had vide ELCA No. E077 of 2023 filed an appeal and obtained orders issued by Justice M. D. Mwangi on 3<sup>rd</sup> July 2023. The said orders were clear and unambiguous that there was a stay of all orders of the lower court.
36. In view of the foregoing, this court is not satisfied that the Respondent has met the threshold for grant of the orders sought in his application dated 11<sup>th</sup> July 2023 that was seeking to cite the Appellants for contempt. The orders sought therein are therefore declined.

### Final Orders

37. Having reviewed, evaluated and considered the issues emanated in the appeal herein, it is the finding of this court that the appeal is meritorious and the same is hereby allowed in the following terms: -
  - i. The consolidated appeal filed herein is allowed.
  - ii. The Ruling and Orders issued on 12<sup>th</sup> June 2023 by the lower court are hereby set aside and vacated.
  - iii. Each party to bear own costs of the Appeal and the proceedings before the lower court.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2024**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Mr. Omar Athman for the Appellants.



Dr. Okubasu for the Respondent.

Court Assisant; Caroline Nafuna.

