Mulemi v Angweye & another (Civil Appeal 170 of 2016)
[2021] KECA 214 (KLR) (5 November 2021) (Judgment)

Neutral citation: [2021] KECA 214 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 170 OF 2016

RN NAMBUYE, W KARANJA & HM OKWENGU, JJA

NOVEMBER 5, 2021

BETWEEN

RODGERS SENAJI MULEMI ..... APPELLANT

AND

ZEPHANIAH NGAIRA ANGWEYE ..... 1ST RESPONDENT

BARCLAYS BANK OF KENYA LIMITED ..... 2ND RESPONDENT

(An appeal from the Ruling and Orders of the High Court of Kenya (E. K. O. Ogola, J.) dated 17th November, 2015inNairobi Commercial & Admiralty Division HC Suit No. 768 of 2010)

JUDGMENT

1. The appeal arises from the ruling of the High Court of Kenya at Nairobi Commercial & Admiralty Division (E. K. O. Ogola, J.) in Civil Suit No. 768 of 2010 dated 17th November, 2015.

2. The background to the appeal is that the 1st respondent, Zephaniah Ngaira Angweye filed Nairobi Commercial and Admiralty Division, High Court Civil Suit No. 768 of 2010, naming the appellant, Rodgers Senaji Mulemi as the 1st defendant while Barclays Bank of Kenya Limited, the 2nd respondent herein as the 2nd defendant. The plaint was dated 12th November, 2016, subsequently amended on 27th January, 2015. The 1st respondent's claim was that he was the lawful owner of property known as title number Isukha/Shitoto/1492 measuring approximately 0.045Ha. (hereinafter referred to as the first suit property) being a subdivision of Plot No. 316 pursuant to a transfer registered on 4th October, 1996 and issued with a title deed on the 4th October, 1996. He also owned land parcel number LR No. Isukha/Shitoto/1529 (hereinafter referred to as the second suit property) which is adjacent to and abuts LR No. Isukha/Shitoto/1492.

3. That upon unlawfully and illegally acquiring LR No. Isukha/Shitoto/ 1492, the appellant constructed septic tanks thereon and fenced it off thereby denying the 1st respondent access or use of the same. It was the 1st respondent's position that the appellant caused the suit property to be fraudulently

registered in his name. He gave particulars of fraud and misrepresentation attributed to the appellant as more particularly set out in the amended plaint. The property was subsequently mortgaged to the 2nd respondent with the appellant's knowledge that the 1st respondent was the legitimate owner of the said 1st suit property.

4. The 1st respondent therefore sought from the court declarations that he was the legal owner of the property referred to as title no. Isukha/ Shitoto/1492 and Isukha/Shitoto/1529, the conveyance in favour of the appellant registered on 25th February, 2002 was null and void abinitio, the mortgage created in favour of the 2nd respondent registered on 29th October, 2008 created through fraud and misrepresentation on the part of the appellant was null and void abinitio; an order directing the appellant to deliver to the Registrar of Lands Kakamega Lands Registry for cancellation, the appellant's original title deed issued on the 25th February, 2002, a permanent injunction restraining the appellant and the 2nd respondent wholly by themselves, agents, servants or otherwise howsoever from trespassing upon, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning and/or otherwise dealing with the first suit property, general damages for fraud and misrepresentation against the appellant, an order directing the appellant to remove all the structures erected by him on the 1st suit property, costs, interests, eviction of the appellant from the second suit property, mesne profits, and any other relief that the court may deem fit to grant.

5. The appellant filed a defence dated 1st December, 2010 subsequently amended on 16th June, 2015, refuting and denying the 1st respondent's allegation contained in paragraphs 4 and 5 of the amended plaint and stated specifically that the 1st respondent was not the lawful owner of the first suit property as at 2002 when the appellant assumed possession and ownership of the first suit property; that the first suit property was legally and procedurally transferred from the 1st respondent to one, Laban Ngaira Mulinya who further transferred it to one, Josephat Shichenje Shivoko from whom the appellant exchanged with land parcel number Isukha/Shitoto/1489. He was a total stranger to allegations set out in paragraph 5 of the amended plaint, land parcel number Isukha/ Shitoto/1529 did not belong to the 1st respondent hence he had no colour of right to lay any claim whatsoever over it; denied that a septic tank had been constructed on the subject parcel, denied particulars of fraud attributed to him, denied the entirety of the 1st respondent's claim against him, put him to strict proof and prayed for the 1st respondent's claim against him to be dismissed with costs to him.

6. At the close of the respective parties pleading, the appellant filed a notice of motion under the provisions of law cited in its heading dated 16th February, 2012, substantively seeking an order that the honourable court be pleased to order the suit to be transferred to Kakamega High Court for final hearing and determination together with an attendant order for provision for costs. The grounds proffered by the appellant in support thereof were briefly that: land parcel No. Isukha/Shitoto/ 1492, was an immovable property situated within Khayega market of Kakamega County; there is a High Court in Kakamega competent to hear the matter; conducting hearing of the matter in Nairobi will occasion injustice to the appellant who lives on the suit land and that both respondents will not be prejudiced in any way if the suit were to be transferred to the ELC Kakamega for hearing and determination.

7. The notice of motion was canvassed through oral submissions with counsel for the 1st respondent arguing that the matter had been determined in HCCC No. 767 of 2010, while counsel for the appellant asserted that HCCC No. 767 of 2010 was not only between different parties, but it was also in respect of a different parcel of land.

8. In a ruling delivered the same date, the learned Judge, Kimondo, J. declined to accede to the appellant's request. The reasons the learned Judge gave for declining to accede to the appellant's request for transfer of the suit to Kakamega High Court among others were that: the litigation had been in court for over

7 years; though good grounds had been advanced for seeking the transfer of the suit to Kakamega High Court namely; that both the substratum of the suit, that is, the first suit property and appellant were both based in Kakamega; the appellant was guilty of laches as parties had complied with pre-trials and set down the matter for hearing.

9. The Judge then concluded that the application under consideration before him had been set up as a barrier to the hearing of the chamber summons dated 12th November, 2010. It was also belated. According to the Judge, equity should not come to the aid of the indolent. That by laches and conduct, the appellant had acquiesced in the steps taken by the 1st and 2nd respondents to have the matter heard in Nairobi as they were apparently under the impression that jurisdiction of the court would not be challenged. In the Judge's opinion, the application presented by the appellant for transfer in the circumstances before him was not bona fide hence terming it an abuse of the court process and declining to exercise his judicial discretion to allow it.

10. On 16th November, 2015, the appellant filed a preliminary objection dated 16th June, 2015 asserting that: the Court lacked jurisdiction to entertain the matter in view of the provisions of the *Environment and Land Court Act*, 2012; the suit offends the mandatory provisions of sections 15 and 18 of the *Civil Procedure Act*, Cap 21 Laws of Kenya and prayed that the matter to be transferred to Kakamega Environment and Land court for final hearing and determination.

11. The preliminary objection was canvassed through oral highlighting. It was the appellant's counsel's cumulative submission that the court lacked jurisdiction to entertain the matter because according to counsel, after effecting amendments to the plaint on 16th May, 2015, the prayers in the plaint purely lay within the jurisdiction of the Environment and Land court at Kakamega as the 1st respondent was seeking eviction, injunction and declarations touching on the two suit properties situated in Kakamega County.

12. The 1st respondent opposed the preliminary objection arguing, inter alia, that: the matter was filed in 2010 before the new constitution came into operation; it was part heard; they filed an amended plaint on 26th May, 2015 and the amended defence on 15th November, 2015; issue raised in the P.O had been raised earlier through an application rejected by the Court whose order was never appealed against; the P.O. dated 16th June, 2015, and which for unknown reasons was not filed until 16th November, 2015 and served on the same date was not only res judicata but also an abuse of the due process of the court.

13. Without prejudice to the foregoing, senior counsel appreciated that the matter was in the High Court of Kenya, Nairobi Commercial Court Division because of the inclusion of the 2nd respondent who had advanced the mortgage loan to the appellant but which had since been repaid and the property discharged. They therefore had no objection if the matter were transferred to the ELC with the only caveat being that the transfer be to the ELC Nairobi for hearing and disposal.

14. After due consideration, the Judge declined to sustain the appellant's P.O. reasoning, inter alia, that: the matter was part heard, it was filed in 2010 before the coming into force of the new constitution, the jurisdiction clause allows matters that were being heard to continue in the court hearing them. The application was not well founded legally. It was also factually wanting having been founded on flimsy grounds with the sole intention of delaying, derailing or obstructing the hearing of the matter scheduled for that date and dismissed the P.O. with costs to be paid by the appellant before the next hearing date. In default, appellant was to be denied audience before court.

15. The appellant was aggrieved and is now before this court on a first appeal raising five (5) grounds of appeal. It is his complaint that the learned Judge erred both in law and fact:

i) By failing to note that he did not have jurisdiction to entertain the matter purely a preserve of the Environment and Land court as per the provisions of section 13 of the Environment and Land court, Act 2012.

ii) By conferring himself with the jurisdiction to hear a suit touching on land situated in Kakamega County in contravention of sections 15 and 18 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.

iii. In failing to uphold the appellant's preliminary objection to transfer the matter to the Environment and Land court in Kakamega despite the admission by the respondent that the court did not have jurisdiction to hear the matter.

iv. By not directing his mind to the pure point of law raised in the appellant's preliminary objection dated 16th June, 2016 instead dealt with extraneous issues not before him hence arrived at a wrong decision of ordering the payment of punitive costs. This caused a miscarriage of justice.

v. By failing to record the appellant's submissions in support of the preliminary objection specified in respect of the practice direction as contained in Gazette Notice No. 16268 dated 9th November, 2012 particularly direction no. 4.

16. During the pendency of the appeal, the appellant filed a notice of motion under certificate of urgency dated 17th October, 2016. It was premised on provisions of law cited in its heading. Substantively, the motion sought stay of proceedings in Nairobi HCC No. 768 of 2010 (Commercial and Admiralty Division) pending the hearing of the motion application in the first instance and the appeal in the second instance. Directions were given by the Deputy Registrar on 27th November, 2019 that both the notice of motion and the appeal be heard simultaneously pursuant to which learned counsel for the respective parties herein filed written submissions covering both processes.

17. Both processes were placed before the court on 7th June, 2021 for hearing and disposal. Learned counsel, Mr. Ondieki Innocent appeared for the appellant while learned counsel, Dr. Khaminwa appeared for the respondent. Both counsel consented to have the appeal proceed to hearing. The notice of motion dated 17th October, 2016 whose interim outcome would have definitely preempted the outcome of the appeal considering the interlinkage of the underlying issues will be treated as having been subsumed into the appeal.

18. Supporting the appeal, the appellant submits that the trial Judge currently seized of the matter being designated as a Commercial Court Judge has no jurisdiction to hear and determine a suit touching on disputes relating to the environment and the use and occupation of and title to land. The appellant relies on section 4 of the *Environment and Land Court Act* No. 19 of 2011 establishing the Environment and Land Court (ELC Court) and section 13 of the same Act donating jurisdiction to the court established under section 4 of the Act. It is appellant's position that the reliefs sought by the 1st respondent in his amended plaint as rebutted by the appellant's amended defence are a clear demonstration that issues in controversy in the said pleadings fell in the realm of matters that fall for adjudication by the court established under section 4 of the Act and which court is vested with jurisdiction to adjudicate over matters enumerated in section 13 of the Act into which the contested reliefs sought from the court by the 1st respondent and rebutted by the appellant fell.

19 The appellant also relies on the locus classicus case of *Owners of the Motor Vessel "Lilian S. vs. Caltex Oil (Kenya) Ltd [1989] eKLR* on the threshold for sustaining a plea of want of jurisdiction; Article 162 (2) (b) of the *Constitution of Kenya, 2010* setting up the ELC Court as a specialized court; operationalized by Parliament enacting the Act incorporating sections 4 and 13 of the Act. The appellant therefore

urges the Court to fault the trial court for arrogating to itself jurisdiction to hear and determine the suit when to its knowledge it has no jurisdiction to try the matter. Second, also for the trial court's failure to appreciate that sections 15 and 18 of the *Civil Procedure Act* stipulates explicitly that a suit ought to be filed where the geographical and territorial jurisdiction of the substratum of the suit are located which in the instant appeal are the first and, second suit properties which indisputably are situated in Kakamega County.

20. The appellant further relies on Article 2(2) of the Constitution of Kenya, 2010 for the provision that no person may claim or exercise state authority except as authorized under the Constitution, and asserts that by the trial court conferring to itself void jurisdiction it contravened not only the *Civil Procedure Act* and the ELC Act but also the Constitution of Kenya.

21. To buttress the above submission, the appellant relies on the decision in the case of *Republic vs. Karisa Chengo vs. Others [2017] eKLR* for the holding, inter alia, 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 upon it by law. Also relied upon is the case of Lawrence *Musango Oketch & 2 Others vs. Karen Enterprises Ltd [2019] eKLR*, in which this Court wasexplicit that where a court of law exercises jurisdiction over a matter it has no mandate in law to deal with the exercise of such jurisdiction is an exercise in futility as the resulting order/judgment is nothing but a nullity and void abinitio.

22. The appellant also faults the trial court for the failure to sustain his P.O especially when counsel for the 1st respondent intimated to the Court that he had no objection to the matter being transferred to the ELC Court in Nairobi. Second, for the failure not only to reflect on the record but also to properly appreciate and take into consideration the appellant's submissions on the import of the Chief Justice's Practice Direction No. 4 in the Gazette Notice No. 16268 dated 9th November, 2012 which provided explicitly that fresh matters touching on *Environment and Land Court Act* be transferred to the Environment and Land Court for final hearing and disposal. The appellant appreciates the above Chief Justice's Practice Direction was superseded by another issued vide Gazette Notice No. 5178 dated 25th July, 2014. Paragraph 4 and 5 thereof stated as follows:

    1. All part-heard cases relating to the environment and use and occupation of, and title to land pending before the High Court shall continue to be heard and determined by the same court.

    2. All cases relating to environment and the use and occupation of, and title to land which have hitherto been filed at the High Court and where hearing in relation thereto are yet to commence shall be transferred to the Environment and Land Court as directed by a judge.

23. The appellant's take on the above is that the litigation giving rise to this appeal was affected by both Gazette Notices as these were issued even before the hearing commenced and should not have been ignored by the trial court which failed to either reflect the appellant's submissions made thereon, on record or take them into consideration when arriving at the conclusions forming the impugned ruling.

24. In a brief rebuttal, the respondent submits that the appellant has not only been economical with information on the stage the proceedings in the trial court have reached but has also misled the Court into hearing the appeal and causing it to reserve the matter for a judgment date knowing that the orders sought in the appeal are no longer tenable as both parties have fully testified, called witnesses and closed their respective cases, and the matter reserved for filing of written submissions. They, on their part had already filed and served their written submissions on the appellant. The appellant was yet to file and serve his written submissions, scheduled by the court for highlighting on 21st June, 2021.

25. In light of the above uncontroverted position, the 1st respondent therefore, invites the Court to take into consideration a cardinal guiding principle that litigation has to come to an end and decline the appellant's invitation to grant the relief sought on appeal as in the 1st respondent's opinion, it is not only without merit but also solely intended to derail the cause of justice amounting to an abuse of the Court process and a waste of precious judicial time, and urged the Court to dismiss the appeal with costs to them.

26. This is an interlocutory appeal arising from the trial court's exercise of judicial discretion in declining to uphold the appellant's preliminary objection on want of jurisdiction in the trial court to hear and determine the issues in controversy in the respective parties' pleadings.

27. The principles that guide the court when determining whether to interfere with the trial court's exercise of discretion have now been crystalized by numerous decisions of this Court and the Supreme Court. Ringera, Ag. J.A (as he then was) in *Githiaka vs. Nduriri [2004] 1 KLR 67* was explicit that judicial discretion is unfettered with the only caveat being that it should be exercised without whim, caprice or sympathy but with good reason with the sole purpose of doing justice to the parties before the Court.

28. In *Mbogo & Another vs. Shah [1968] E.A 93; at page 94, paragraph H - 1 Sir Clement De Lestang V.-P:* had this to say:

> " I think it is well settled that this Court will not interfere with the exercise of 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 on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

See also Sir Charles Newbold, P., in the same decision at page 96 paragraph G - H where he expressed himself as follows:

> " For myself, I like to put it in the words that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

29. In reiteration of the above principle, the Court in the *United India Insurance Company Limited vs. East African Underwriters Kenya Ltd [1985] KLR 898* was explicit that interference with exercise of judicial discretion only arises where there is clear demonstration of misdirection in law, misapprehension of the facts, taking into consideration factors the Court ought not to have taken into consideration or failure to take into consideration factors that ought to have been taken into consideration or looking at the decision generally. The only plausible conclusion reached is that the decision albeit a discretionary one is plainly wrong.

30. We have applied the above threshold to the record. Our take on the same is that all that was expected of the trial court in response to the appellant's invitation to sustain his P.O was simply to determine whether the appellant's P.O, firstly met the threshold for sustaining a P.O.; and second, whether the same was sustainable and or otherwise and give reason either way. Our appraisal of the record as laid before us does not reveal that the above correct approach was embraced by the trial court at all.

31. This being a first interlocutory appeal, we are entitled to revisit the record, reevaluate it on our own and express ourselves on the sustainability or otherwise of the appellant's P.O. and give reasons either way.

32. It is now trite that the threshold for sustaining a P.O. is that set by the predecessor of the court in the case of in the case of *Mukisa Biscuit Co. vs. West End Distributors Ltd [1969] E.A 696*, wherein Law, J.A, expressed himself on this issue as follows:

> " ...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

See also Sir Charles Newbold, P.:, in the same case wherein he expressed himself as follows:

> " A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."

33. From the above expositions, elements/ingredients for sustaining a preliminary objection may be distilled as follows:

i) It must be a pure point of law;

ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;

iii) If argued as a pure point of law, it may dispose of the suit;

iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court's discretion.

34. We have applied the above identified elements/ingredients to the content of the P.O. raised by the appellant before the trial court. Our take thereon is that element (i) is satisfied as the appellant's objection touched on want of jurisdiction. Element (ii) has also been established as the issue was raised in paragraph 14 and 15 of the appellant's amended defence. These read as follows:

> " 14. The 1st defendant shall at the earliest opportune moment raise a preliminary objection that the court does not have the prerequisite jurisdiction to hear and determine the matter.
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> 15. The 1st defendant further states that in view of the provisions of the Land and Environment Act 2012, the court will lack jurisdiction to entertain the suit and that the 1st defendant shall raise preliminary objection to have this suit struck out for disclosing no reasonable cause."

35. Element (iii) is also satisfied because if sustained, the proceedings undertaken so far without jurisdiction will be declared null and void abiinitio. Element (iv) is also satisfied because no facts are required to prove the constitutional and statutory provisions of the law as well as the contents of the Practice Directions issued by the Chief Justice highlighted above.

36. The respondent has argued that proceedings have been concluded and rerouting parties to the ELC will not only be highly prejudicial to the parties but will also be an exercise in futility.

37. In resolving the 1st respondent's complaint above, we fully adopt the position taken by the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others, [2012] eKLR*, in which the Court expressed itself that a court can only exercise that jurisdiction that has been donated to it, either by the Constitution or legislation or both. A court of law cannot therefore 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 the dispute. Without it, the court cannot entertain any proceedings and must down its tools. In the Owners of the *Motor Vessel "Lilian S. vs. Caltex Oil (Kenya) Ltd* [*supra*]. Nyarangi, J.A. (as he then was) expressed himself thereon as follows:

> " Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. .....:
>
> By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance 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 the 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. ..... Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

38. That position was restated by this court in the case of *Adero & Another vs. Ulinzi Sacco Society Limited [2002] I KLR 577*, wherein the Courtexpressed itself on the law on jurisdiction as follows:

> " 2. The jurisdiction either exists or does not ab initio the non-constitution of the forum created by Statute to adjudicate on specified disputed 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.
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> 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."

39. From the above expositions of both the Supreme Court of Kenya and this Court, it is evident that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though we appreciate that it is always prudent to raise it at the earliest opportunity to avoid unnecessary inconvenience and/or costs. In the instant appeal, the question of want of jurisdiction was raised at the earliest opportunity before commencement of the trial before the High Court, first in the chamber summons that was declined as highlighted above, and, subsequently, in the P.O which was also not sustained giving rise to this appeal.

40. We reiterate the position taken above that the P.O. raised by the appellant before the trial court was well founded and therefore sustainable. It is also our position that the exposition on jurisdiction

highlighted above, when considered in conjunction with both the constitutional and statutory provisions establishing the ELC as well as the Chief Justice's Practice Directions highlighted above leave no doubt in our minds that, as a court of law, we cannot be permitted in law to disregard the clear constitutional provision entrenching the ELC Court, pursuant to which the statutory provision for establishing and vesting the court with mandate was enacted.

Article 259(a) of the Constitution enjoins us to interpret the Constitution with a view among others to promote its purposes, values, principles and give effect to it. In light of this exhortation, we have no doubt the provision entrenching the ELC Court was not meant for cosmetic value. The Supreme Court emphasized on this in relation to authority conferred to specialized courts and which we fully adopt in *Republic vs. Karisa Chengo & 2 Others* [*supra*] that:

> " A court's jurisdiction flows from either the constitution or legislation or both. This a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law."

41. We would also like to emphasize the position taken by the court in Owners of the *Motor Vessel "Lilian S. vs. Caltex Oil (Kenya) Ltd* [supra] *inter alia* as follows:

> " A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

See also *Lawrence Musango Oketch & 2 Others vs. Karen Enterprises Lt*d [*supra*] and *Macfoy vs. United Africa Co. Ltd [1961] 2 AII* ER 1169.

42. On the totality of the above assessment and reasoning, we find that the learned Judge not only misdirected himself but also exercised his judicial discretion wrongly when he declined to address his mind and interrogate whether the P.O. raised by the appellant before him met the threshold for sustaining a P.O. It is this erroneous exercise of judicial discretion that has resulted in the trial court arrogating itself with jurisdiction to determine the matter to the detriment and great prejudice to the respective parties herein as the entire proceedings undertaken by the trial court amount to nothing but a nullity irrespective of their respective status as at the time the appeal herein is finally concluded.

43. In the result, we allow the appeal and set aside in its entirety the proceedings and judgment (if any) of the High Court delivered in Nairobi HCCC No. 768 of 2010. We direct the suit between the parties be and is hereby transferred to the Environment and Land Court at Kakamega which has jurisdiction to hear and determine the matter. We direct that in view of its age, the suit be heard on priority basis. Each party to bear his/its own costs.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR