**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)**

**CIVIL APPEAL NO. 112 OF 2015**

**BETWEEN**

**MIWANI SUGAR MILLS LIMITED .....1ST APPELLANT**

**MIWANI SUGAR COMPANY (1989) LIMITED .....2ND APPELLANT**

**AND**

**CROSSLEY HOLDINGS LIMITED .....1ST RESPONDENT**

**NAGENDRA SAXENA .....2ND RESPONDENT**

**JOHN G. KIMANI t/a JOGI AUCTIONEERS .....3RD RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Kisumu* ***(H. K. Chemitei, J.)*** *dated 15th October, 2015* in **HCCC No. 225 of 1993**)

**JUDGMENT OF ASIKE-MAKHANDIA, JA**

This is an appeal from the ruling of the High Court, **(H. K. Chemitei, J.)** delivered on 15th October, 2015 in which the 1st appellant's application seeking that an order be directed at the Registrar of Titles or the Principal Registrar of Titles to cancel entry numbers 30, 31 and 32 registered against title Number LR No. 7545 (I.R No. 21038, hereinafter "**the suit property",** was dismissed with costs. In the ruling the learned Judge directed parties to file a substantive suit in the right forum, that is, the Environment and Land Court (ELC).

The brief background to this appeal is that on 28th June, 1993 the 2nd respondent filed Civil Suit Number 225 of 1993 in the High Court at Kisumu claiming $400,000 from the 1st appellant for work done and services rendered. Summons were duly issued but were never served. The suit remained dormant until an application for extension of validity of summons was filed, heard and allowed in May 2007. On 20th June, 2007 ex-parte judgment was entered in favour of the 2nd respondent for the sum of $400,000 and interest at 20% per annum from the time of filing suit. This was after the 1st appellant failed to enter appearance to the re-issued summons upon being served. On 29th June, 2007 a bill of costs was taxed at Kshs. 542,182/-. The decree was then executed through sale by public auction of the suit property belonging to the 1st appellant on 24th December, 2007 to the 1st respondent. The Registrar of Titles thereafter transferred the suit property to the 1st respondent.

The 1st appellant then moved the court to have the ex parte judgment set aside and the question arose as to whether the renewal of summons by the deputy registrar was within the law. The court, (Mwera, J) held that the deputy registrar had no jurisdiction to re-issue summons after the expiry of 24 months after the filing of the suit hence declared as a nullity the re-issue of the summons and whatever followed thereafter. Aggrieved, the 2nd respondent filed an appeal being Civil Appeal Number 261 of 2008 in this Court. This Court upon hearing the appeal upheld the decision of the High Court. Spurred by the two decisions, the 1st appellant filed an application for cancellation of entries in the register in favour of the 1st respondent in the original suit, that is, Civil Case No. 225 of 1993.

The High Court, (Chemitei, J) upon hearing the application inter-parties pronounced himself in the ruling dated 15th October, 2015. He held that he was deprived of jurisdiction to hear the matter as all the issues relating to land fell under the umbrella of the ELC by dint of Article 162 (2) (b) of the Constitution and section 13 (2) (d) of the Environment and Land Court Act. Relying on the case of **Job Muriithi Waweru v Patrick Mbatia (2008) eKLR,** the Judge stated that the issue before him was in relation to cancellation of entries in the land register which would mean interference with the 1st respondent's land ownership rights hence, the controversy was in relation to title to land and therefore fell under the jurisdiction of the ELC. In the end the learned Judge dismissed with costs the application and the suit under Order 5 Rule 2(7) and, as already stated, directed that a fresh suit be filed in the ELC.

The appellants were aggrieved by this decision. They lodged the present appeal in which they raised six (6) grounds, to wit that the learned Judge erred in law and in fact in; holding that the issues in the application could only be determined at a trial in a new suit and that the appellant had not been granted an opportunity to put its case forward; holding that he had no jurisdiction to hear and determine the application and ignoring directions on record relating to the question of jurisdiction and in dismissing the application on that account; rejecting the application even after he found that the 2nd respondent's suit on the basis of which the suit property had been transferred to the 1st respondent was no suit; purporting to dismiss a suit that was either a nullity or had been determined when such a move was superfluous, unnecessary and had not been raised before him; deciding the application without hearing the parties on the same; and that the decision of the learned Judge flew in the face of the overriding objective of the Civil Procedure Act and the rules made thereunder and of Article 159 of the Constitution.

During the hearing of the appeal, **Mr. Otieno,** learned counsel appeared for the appellant, whereas **Mr. Wasuna** and **Mr. Gichaba,** learned counsel appeared for 1st and 2nd respondents respectively. **Mr. Gichaba** also held brief for **Mr. Onsongo,** learned counsel for 3rd respondent. They all relied on their written submissions and briefly highlighted the same.

Mr. Otieno relying on the case of **Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation & 2 Others (1998) eKLR** took the view that as the court had made a finding that the proceedings leading to the transfer of the suit property to the 1st respondent were a nullity and could therefore not result in a valid title, the orders were of no legal effect and needed not to be set aside by filing of a fresh suit. It was his submission that the application before the High Court was in the nature of enforcement proceedings and an application for execution of the court order that declared the judgment and decree pursuant to the transfer could not pass title as it was null and void. That the Court of Appeal made a finding to the effect that the 1st respondent had no title though the registrar of titles had already registered it as the proprietor. Counsel further submitted that the learned Judge was wrong in directing the parties to file a separate suit in the ELC when the issue in dispute was commercial in nature and the land issue arose at the execution stage and could not therefore become a land dispute. That for the court to determine the issue of jurisdiction, it would have to look at the suit as was filed and it would be illogical to reason that the suit was a commercial dispute as filed and became a land matter just because of the character of the property attached in execution thereof. He sought refuge in the case of **Co-operative Bank of Kenya Ltd v Patrick Kangethe Njuguna (2017) eKLR)** for this proposition**.**

Counsel further submitted that the court had a duty to determine that the suit was a nullity and make such orders as may be necessary to ensure that the null and void order was not enforced and that no party benefits or is prejudiced by it. That in the instant case it was necessary for the 1st appellant to move the court to reverse the entries in the register in the same suit. He went on to submit that the order to dismiss the suit was unnecessary and had the effect of giving the appellants the false impression that they had succeeded. Counsel was of the view that all court decisions ought to be made with the overriding objective in mind and the orders appealed against were inimical to that objective. Finally, counsel submitted that the learned Judge erred in finding that the 1st respondent was not given an opportunity to state its case when in fact the 1st respondent was at all times represented by counsel and was joined to the suit in the trial court.

Mr. Wasuna opposed the appeal in its entirety. He raised three issues for determination. First was whether the High Court was the proper forum to adjudicate the issues raised by the appellants. His simple answer was no. He was in agreement with the learned Judge's finding that the High Court was not the proper forum to hear and determine issues relating to the suit property and in particular cancellation of title after statutory sale. He maintained that such issues can only be determined by the ELC. Relying on **Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others (2016) eKLR, Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd (1989) KLR 1** and the Supreme Court decision in **Samuel Kamau Macharia & Ano. v Kenya Commercial Bank Limited & 2Others (2012) eKLR,** counsel emphasized the importance of jurisdiction and the fact that a court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law and that, jurisdiction was not a mere technicality but was at the very heart of the matter. That the prayers sought in the memorandum of appeal were the same orders the appellants were seeking in the High Court and for this Court to grant them will be in vain given that the High Court lacked jurisdiction. Be that as it may, counsel maintained that the High Court could not conclusively determine the issue as the 1st respondent and the registrar of lands who would be affected by the orders were not principal or substantive parties to the suit. He relied on the case of **Kabitao Karanja v The Attorney General, CACA No. 310 of 1997** for this submission.

Secondly, counsel raised the issue whether the 1st Respondent's right to property could be defeated without a hearing. Again his answer was an emphatic no. He submitted that the 1st respondent's right to property was protected under Article 40 of the Constitution having purchased the suit property through a sale by public auction and is the undisputed registered proprietor thereof. That once the 1st respondent was issued with the title to the suit property, it was conclusive evidence of its ownership. It had acquired absolute and indefeasible title as provided for by Section 26(1) of the Land Registration Act and such title could only be impugned on account of fraud, misrepresentation or illegality to which it was a party to. He relied on **Parkview Shopping Arcade v Kangethe & 2 Others (2004) eKLR)** for this submission**.** Lastly, counsel posed the question whether the 1st appellant was guilty of non-disclosure of material facts. It was his submission that the 1st appellant failed to disclose to the High Court that there were other pending suits in the High Court, in which orders of status quo were issued barring sale or transfer of the suit property; and that the 3rd respondent had since died and had not been substituted. To buttress this issue, counsel cited the case of **Rashida Rajabali Ganjijee & Ano. v Harveen Gathoke & 3 Others (2007) eKLR** and urged this Court to dismiss the appeal.

Mr. Gichaba similarly opposed the appeal. He questioned whether the appellants' advocates were properly on record. They filed a memorandum of appearance under protest disputing the existence of the 1st appellant hence they had no authority or capacity to act for it. They were therefore never instructed to appear, plead or act on its behalf hence the appeal as lodged is incompetent and cannot stand in law. He relied on the case of **Multi Options Limited (in receivership) v Kalpana S. Jai & 2 Others (2009) eKLR)** for this submission. On whether the appeal by the 2nd appellant is competent, counsel submitted that the application in which the 2nd appellant sought to be enjoined as an interested party was never determined and as such the 2nd appellant is a busy body in this appeal. That the application was an abuse of the court process and ought to have been struck out at the first instance as the advocates did not have instructions to act. As regards the 1st appellant being wrongly described, counsel disagreed and submitted that the 1st appellant was a legal entity with rights to sue and be sued based on the contract of consultancy between it and the 2nd respondent. That the registrar of titles and the principal registrar of titles were not parties to the proceedings and the principles of natural justice demand that no party should be condemned unheard.

Regarding whether the court's jurisdiction was properly invoked, counsel pointed out that Sections 1A, 1B and 3A of the Civil Procedure Act do not donate any jurisdiction to the Court to issue the orders sought and that Section 3A of the Civil Procedure Act cannot be invoked where there are specific provisions of law, like in the instant case, for the cancellation of title to land. Counsel submitted further that the court could not decide the issue of cancellation of title by way of an application even if it had jurisdiction as no decree could follow and therefore the issue could only be determined by a substantive suit before a competent court where all affected parties will be given an opportunity to be heard. Finally, counsel prayed for the dismissal of the appeal with costs. The 3rd respondent did not put in its written submissions.

This is a first appeal. It is trite that the duty of the first appellate Court is to re-appraise and re-evaluate evidence tendered in the trial court and come up with its own findings and conclusions. In the case of **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** this Court restated the principle as follows:

> *"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited 2000 2EA 212 wherein the Court of Appeal held, inter alia, that:-*
>
> *"On a first appeal from the High Court, the Court of Appeal should consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."*

I have considered the record, submissions by the parties and the law. This is one of those unfortunate cases where a litigant may feel hopeless and discouraged in pursuit of justice by being tossed from one court to another on account of want of jurisdiction. The appeal contains so many jumbled issues, most of which are being raised in the submissions for the first time. To my mind, however, the main issue that calls for determination is whether the High Court had jurisdiction to hear and determine the appellants' application, the subject of this appeal.

It is the appellants' contention that the High Court had jurisdiction to hear and determine the application before it as the dispute at hand was in relation to a consultancy contract and not a land dispute. The respondents countered that argument and submitted that an order for cancellation of title to land did not fall within the jurisdiction of the High Court but with the ELC. The learned Judge in the impugned ruling held that he did not have jurisdiction to entertain the application and ordered that a fresh suit be filed in the proper court, the ELC. This largely explains why the learned Judge did not analyze the bulk of arguments urged before him.

It is said that jurisdiction is everything and if the court smells a hint of want of jurisdiction in a matter before it must interrogate it, and if true, it must immediately down its tools as any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order. What is a nullity remains a nullity. (See: **Kabitao case,** (supra)). **In the Matter of Advisory Opinions of the Supreme Court under Article 163(3) of the Constitution- Constitutional Application No. 2 of** 2011 the Supreme Court stated:

> *"The Lillian 'S' case [[1989] KLR 1] establishes that jurisdiction flows from the law, and the recipient-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 **Samuel Kamau case,** (supra), the Supreme Court delivered itself as follows on the issue of jurisdiction:

> *"A court's jurisdiction flows from either the Constitution or legislation or both."*

The appellants mainly sought an order for cancellation of the title to the suit property. Their argument was that a commercial suit was filed and it could not then be said that the same become a land dispute due to the nature of property attached in execution of the decree. In the instant case, the orders sought were for cancellation of title. The High Court did not have jurisdiction to order cancellation of title. It is trite law that matters relating to land are determined by the ELC as provided for under Article 165 of the Constitution and Section 13 of the Environment and Land Court Act. Further, the application was not the right procedure to move the court as a decree could not issue for enforcement as correctly submitted by counsel for the 3rd respondent.

It is not in dispute that the cause of action was a consultancy agreement between the 1st appellant and the 2nd respondent. Upon specific performance of the contract, the 2nd respondent submitted his report and the agreed final contractual sum amount of $400,000 in November 1987. The payment was not forthcoming and therefore the 2nd respondent vide a plaint dated 28th June, 1993 claimed the $400,000 plus 20% interest at commercial rates. As stated elsewhere in this judgment, summons expired and were renewed almost 15 years later and the 2nd respondent was granted the prayers sought. A public auction was conducted in execution of the decree and the suit property was sold to the 1st respondent in whose name the title of the suit property was subsequently registered.

It is common ground that the court found that there was no valid judgment to be executed and if the suit was a nullity, nothing could come out of it, even the sale by public auction should not have taken place. Equally and for the same reason the appellants' application for cancellation of title was dead on arrival. The prayers sought could not have been granted on a non-existent suit or suit which is a nullity as claimed by the appellants. For this reason I cannot find fault with learned Judge for holding that a fresh suit was the best forum for the determination of the issues in dispute.

Be that as it may, I am faced with an instance where the title had already been transferred to the 1st respondent and the said title registered in its name. This Court categorically declared in the case of **Dr. Joseph Arap Ngok v Justice Moijo Ole Keiwua & 5 Others, Civil Appeal**

**No. 60 of 1997** that:

> ***"Section 23 of the then Registration of Titles Act (now reproduced substantially as Sections 25 and 26 of the Land Registration Act) as set out below gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy."***

Section 26 (1) of the Land Registration Act provides that:

> **"The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer … shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner … and the title of that proprietor shall not be subject to challenge, except –**
>
> **(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**
>
> **(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme." (**See: **Park View Shopping Arcade,** (supra)**).**

As empathetic as I am with the unfolding of events, my duty is to ensure that the ends of justice are met. I have an unenforceable judgment on the one hand and the 1st respondent who is presumed to be an innocent purchaser for value. With the provisions of Section 26 (1) above in mind, I am of the view that the 1st respondent cannot be condemned unheard. It has a right to have its property protected under Article 40 of the Constitution subject only to limitations provided for by law. In **Munyu Maina v Hiram Gathiha Maina [2013] eKLR** this Court addressed itself as follows:

> ***"Courts have stated that when a proprietor's certificate of title is challenged, it is not sufficient to dangle the instrument as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title."***

In this case, unless the 1st respondent is given the opportunity to be heard on merit and prove the legality of how it acquired the suit property, this Court cannot determine whether or not the said title was acquired with the 1st respondent's knowledge of fraud, misrepresentation or an illegality that he was party to. As I have already stated elsewhere in this judgment, the High Court did not have jurisdiction either. This issue can only be determined by a court of competent jurisdiction, the ELC as provided for by Section 13 of the Environment and Land Court Act and Article 162(2) (b) of the constitution. This determination is sufficient to dispose this appeal.

In the premises, I find the appeal to be bereft of merit and is accordingly dismissed with costs.

This Judgment has been delivered pursuant to rule 32(3) of the Court of Appeal rules since Odek, JA. passed on before the Judgment could be delivered.

As Kiage, J.A, concurs, it is so ordered.

**Dated and delivered at Nairobi this 3rd day of April, 2020.**

**ASIKE-MAKHANDIA**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

***DEPUTY REGISTRAR***

**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MAKHANDIA, KIAGE & ODEK, JJ.A)**

**CIVIL APPEAL NO. 112 OF 2015 BETWEEN**

**MIWANI SUGAR MILLS LIMITED.....1ST APPELLANT**

**MIWANI SUGAR COMPANY (1898) LTD.....2ND APPELLANT**

**AND**

**CROSSLEY HOLDINGS LIMITED.....1ST RESPONDENT**

**NAGENDRA SAXENA .....2ND RESPONDENT**

**JON G. KIMANI t/a JOGI AUCTIONEERS.....3RD RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Kisumu (H.K. Chemitai, J.) dated 13th October, 2015* in **HCCC No. 225 of 1993**)

**JUDGMENT OF KIAGE, J.A**

I have had the advantage of reading in draft the Judgment of my brother Makhandia, JA. Like him, I entertain no doubt whatsoever that this appeal is without merit.

This is primarily for the reason that the title of the 1st respondent cannot be cancelled as the appellant's sought without its being accorded an opportunity to be heard. That is elementary.

Moreover, and perhaps this ought to be the first reason, the learned Judge was correct to hold that a plea for cancellation of title to land, no matter the antecedents, is a matter falling squarely within the jurisdiction of the Environment and Land Court. No amount of craft, innovation or other facially compelling reasons could ever confer upon a court a jurisdiction it does not have. And is clear to me that the Constitution in **Article 165(2)(b)** expressly removes the subject from the jurisdictional competence of the High Court, and reposes it exclusively in the ELC by dint of **Article 162(2)(b).**

The result is that I, too, would dismiss the appeal with costs.

**Dated and delivered at Nairobi this 3rd day of April, 2020.**

**P. O. KIAGE**

**JUDGE OF APPEAL**