IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, MUSINGA & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 231 OF 2015

BETWEEN

LUCY WANJIRU KIRUHI.....1ST APPELLANT

DAVID MWANGI GRACE GUCECA.....2ND APPELLANT

BETH WAIRIMU KAHIU.....3RD APPELLANT

JAMES NJOROGE NJAU.....4TH APPELLANT

CECILIA NDURUKA.....5TH APPELLANT

RICHARD GICHINI NJOROGE.....6TH APPELLANT

AND

LILIAN WAIRIMU NGATHO.....1ST RESPONDENT

ELIZABETH MURUNGARU NJOROGE.....2ND RESPONDENT

(An appeal against the Ruling and Order of the High Court of Kenya at Nairobi, (Nyamweya, J.) delivered on 31st January 2014

in

H.C.C.C NO. 745 OF 2001 (O.S.))

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JUDGMENT OF THE COURT

1. The appeal arises from the ruling of ***Nyamweya, J.*** dated 31st January 2014 in ***HCCC No. 745 of 2001 (O.S)***. The ruling was in respect of an application by the appellants and 15 other persons, (all referred to as the appellants), who are all purchasers of various parcels of land, being sub-divisions of ***LR No. 5964/1*** **"the suit property."**

2. The appellants made applications to be joined as defendants to the suit that had been filed by the respondents. At the time of making the application the suit had been heard and a judgment delivered by ***Ojwang, J***. (as he then was) on 30th July 2010. The appellants further sought a review of the said judgment and setting it aside so that the suit would be heard *de novo*.

3. The appellants stated that they were innocent and bona fide purchasers of various subdivisions of the suit property that was previously owned by ***Moki Savings Co-operative Society Limited*** (the first defendant in the High Court suit) and other third parties; that the suit was heard and determined without their knowledge and it is after the delivery of the judgment when they learnt that the court had nullified their titles. They found that the said Moki Savings Co-operative Society Limited and Lucy Wanjiru Kiruhi, who were the defendants in the suit, had unlawfully acquired the suit property before they sold the various sub-divisions to them and other third parties, who had in turn sold to some of the appellants.

4. The appellants argued in their applications for review that they had extensively developed their respective parcels of land and had been in peaceful possession thereof for years, yet they had been condemned unheard. For those reasons, they urged the learned judge to grant them the aforesaid orders.

5. The respondents opposed the applications. They deponed, *inter alia*, that the transfers in favour of the appellants were registered when the suit was either pending in court or had been concluded and the Registrar of Lands served with the decree in the matter. The transfers were therefore null and void and contrary to the principle of *Lis Pendens*.

6. They further deponed that the appellants continued to develop portions of the suit property in defiance of court orders and were notified of the pending suit through the print media by way of advertisements of ***caveat emptor*** notices and also by conspicuously displaying notices on the suit property. The appellants were therefore not innocent purchasers for value without notice.

7. The respondents further contended that the applications for review did not lie because the appellants had lodged a Notice of Appeal; that the appellants had not demonstrated any error or any new and important matter of evidence to warrant a review.

8. In the impugned ruling, the learned judge held that there were ***caveat emptor*** advertisements, placed in the ***"Daily Nation"*** newspapers and therefore the appellants were deemed to have been cautioned accordingly; it would be inequitable to re-open the hearing that had been in the court since 1991; and in any event the case had been concluded and judgment entered.

9. Being aggrieved by the said ruling, the appellants, who are represented by different advocates, filed an appeal to this Court. They stated, *inter alia*, that the ruling amounted to a violation of the fundamental principle of justice, ***audi alteram partem*** because they had been disposed of their property without being afforded an opportunity of being heard; that the learned judge erred in law in stating that an advertisement of caveat emptor was sufficient notice to the appellants of the existence of the suit, and in holding that the matter of the appellants had been conclusively addressed in the judgment, whereas Ojwang, J. had stated that no evidence had been placed before him of their existence.

10. When the appeal came up for hearing, the appellants raised another ground of appeal, that Nyamweya, J., not being a judge of the Environment and Land Court, (ELC), had no jurisdiction to deal with a land matter and therefore the impugned ruling is a nullity. They based that argument on the Supreme Court decision in ***Republic v Karisa Chengo & 2 Others [2017] eKLR***.

11. It is trite law that jurisdiction is such an important matter that it can be raised at any stage of proceedings, even on appeal.

See this Court's decision in ***Kenya Ports Authority v Modern Holdings [E.A.] Limited [2017] eKLR***. Jurisdiction is everything. Without it, a Court has no power to make one more step. See ***Owners of The Motor Vessel "Lillian S" Caltex Oil (Kenya) Ltd [1989] KLR 1***. Where it is alleged that the trial court did not have jurisdiction to render the impugned decision, that issue must first be determined before other grounds of appeal are considered.

12. ***Mr. Kinyua***, the respondents' learned counsel, submitted that Nyamweya, J. had jurisdiction to hear the application. He pointed out that all land matters that were pending in the High Court before the ELC was constituted were to continue to be heard before the High Court until ELC judges are appointed. Counsel however conceded that ELC judges were appointed on 5th October 2012 and the application was heard in September 2013.

13. The ***Environment and Land Court Act*** came into operation on 30th August 2011. ***Section 22*** of the ***sixth Schedule*** to the ***Constitution of Kenya, 2010*** under which the ELC was envisaged ***(Article 162 (2) (b)*** states that: -

> ***"All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court."***

14. ***Section 30*** of the ***Environment and Land Court Act*** *(Transitional Provisions)* states as follows: -

> ***"(1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.***
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> ***(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court."***

15. The judgment that gave rise to the review application was delivered on 31st July 2010. The appellants' applications and other related ones were filed on various dated in 2012. ELC judges were appointed on 3rd October 2012 vide ***Gazette Notice No. 3835***. Shortly thereafter they began to exclusively hear environment and land cases. By ***Gazette Notice No. 16268*** dated 9th November 2012 the Chief Justice directed that-

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

The same Gazette Notice directed that ***all cases relating to the environment and occupation of, and title to land filed in the High Court and were yet to be heard be transferred to the Environment and Land Court.***

16. The chronology of events as summarised above reveals that as at the date the ELC came into operation there was no pending dispute over the suit land, judgment having been delivered on 30th July 2010. The applications by the applicants were akin to new matters that were filed in 2012 which should therefore have been handled by the ELC. Had the orders sought by the appellants been granted, a fresh hearing would have ensued.

17. In ***Republic v Karisa Chengo & Others*** (*supra*) the Supreme Court held as follows: -

> ***"From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with suis generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165***
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> ***(5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court."***

18. In ***Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR***, the Supreme Court expressed itself as follows: -

> ***"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in,*** *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011****. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."***

19. In view of the foregoing, we agree with the appellants that Nyamweya, J. being a judge of the High Court, did not have jurisdiction to hear the application for review. The application ought to have been heard by an ELC judge. The ruling by Nyamweya, J. is therefore a nullity.

20. Having come to that conclusion, it would be superfluous for us to consider the other grounds of appeal. Consequently, we allow this appeal and set aside the impugned ruling by Nyamweya, J. and substitute therefor an order that the applications for review be heard afresh before the ELC at Nairobi. Each party shall bear its own costs of the appeal.

Dated and delivered at Nairobi this 22nd day of May, 2020.

M.K. KOOME

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR