



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OKWENGU, AZANGALALA & MOHAMMED JJ A)**

**CIVIL APPEAL NO. 243 OF 2012**

**BETWEEN**

**J.E. KAMAU**

**JARRED ARUWA.....APPELLANTS**

***(suing as officers of Tena Residents Associates)***

**AND**

**THE DEVELOPER MR. JOB..... RESPONDENT**

***(Being an appeal from the Ruling and Order of the High Court (Hon Mr. Justice D.A. Onyancha)  
delivered on 30<sup>th</sup> November 2011 in HCC Civil Appeal No. 54 of 2007)***

**JUDGMENT OF THE COURT**

[1] This is an appeal by the appellants against the ruling and order of the High Court (Onyancha J.) delivered on 30<sup>th</sup> November, 2011. Litigation leading to the ruling subject of the appeal, originated from a suit filed in the Chief Magistrates Court at Milimani, by J. E Kamau and Jared Aruwa, the Chairman and Secretary respectively suing as officers of Tena Residents Association (*hereafter referred to as the appellants*). They had sued a developer identified as Mr. Job and 4 others (*hereinafter referred to as the respondent*), seeking an injunction to restrain the respondents from interfering with an open-air market located along Outer Ring Road. On 21<sup>st</sup> March, 2003 immediately upon filing the suit the appellants obtained an order of temporary injunction restraining the respondents from evicting them from the suit land pending the hearing and determination of the suit.

[2] After obtaining the interim orders, the appellants took no action to fix their suit for hearing. On 9<sup>th</sup> September, 2005 the respondents filed an application seeking to dismiss the suit for want of prosecution. On 21<sup>st</sup> March, 2006 the trial court having heard the application, delivered a ruling in which it directed the appellant to “**prosecute the suit within 60 days failing which the suit shall stand dismissed**”.

[3] It appears that the appellant failed to abide by the orders of the court and subsequently filed an application dated 25<sup>th</sup> May, 2006 seeking extension of time for prosecution of the suit as well as the setting aside of the order dismissing the suit. In its ruling delivered on 19<sup>th</sup> January, 2007, the trial court

dismissed the appellant's application dated 25<sup>th</sup> May, 2006 and further ordered dismissal of the suit against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents.

[4] The appellant aggrieved by this decision appealed to the High Court. After hearing the appeal the High Court (Maraga J, as he then was) delivered its Judgment on 9<sup>th</sup> March, 2011. In the Judgment the learned judge set aside the dismissal order and reinstated the suit ***“on condition that the appellants prosecutes it within 90 days failing which the same shall stand dismissed with costs”***. It is important to point out that the learned judge stated in his judgment that the only reason he allowed the appeal was because the trial court erred in dismissing the suit without giving notice to the parties.

[5] Despite being granted a second respite, the appellants again failed for one reason or another to prosecute the suit within the 90 days period as directed. On 6<sup>th</sup> October, 2011 the respondents filed an application in the trial court seeking dismissal of the suit as the 90 days had expired. This appears to have jolted the appellants from their slumber and on 12<sup>th</sup> October, 2011 they filed an application in the High Court seeking an extension of the time for prosecuting the suit. The respondents vehemently opposed the application and on 30<sup>th</sup> November, 2011 Onyancha J, who heard the application delivered the impugned ruling. In his ruling the learned Judge held that he had no jurisdiction to enlarge time as doing so would amount to him sitting on appeal against the ruling made by Maraga J, a Judge of concurrent jurisdiction. The learned judge further held that even if he was clothed with such jurisdiction there was nothing to extend as the suit stood dismissed on 8<sup>th</sup> or 9<sup>th</sup> June, 2011 after the expiry of the 90 days period.

[6] It is that decision that culminated in this appeal. The memorandum of appeal listed 3 grounds of appeal namely, that the learned judge erred in law in construing narrowly the powers of the court under **Order 50 Rule 6** of the **Civil Procedure Rules**, and **Section 59** of the **Interpretation and General Provisions Act (Cap 2)** to extend time fixed by an order of the court for doing an act or taking a proceeding; that the learned Judge erred gravely in law in failing to be guided by law in the exercise of his discretion to extend time and in particular **Article 159 (2) (d)** of the **Constitution of Kenya, Section 1A** and **1B** of the **Civil Procedure Act** and the inherent Jurisdiction of the court; that the learned Judge erred in law in taking too technical a view of the notice of motion dated 22<sup>nd</sup> September, 2011 and failing to find that the demands of justice weighed in favour of granting the orders sought.

[7] When the matter came up for hearing before us, Mr. Boniface Njiru appeared for the appellants and Mr. Munene Ng'ang'a appeared for the respondent. Mr. Njiru submitted that the notice of motion dated 22<sup>nd</sup> September, 2011 moved the court to enlarge time under **Order 50 Rule 6** of the **Civil Procedure Rules**. Counsel submitted that the learned Judge had jurisdiction to vary the order of Maraga J, with regard to time for prosecution of the suit; that the learned Judge misconstrued his jurisdiction as he should have looked holistically at the suit and not just exercise his jurisdiction technically; that the suit involved a large number of people; that there was evidence that the land was allocated to the respondent irregularly; that the appellants were unable to fix a date within 90 days as the file was not available because it had not been forwarded to the lower court from the High Court and that the learned judge did not consider the merit of the application because he misconstrued his jurisdiction.

[8] In reply, Mr. Ng'ang'a, counsel for the respondent, urged the court to consider the conduct of the appellants who had been cavalier in prosecuting the suit.

Counsel submitted that the appellants were given 60 days by the trial court to prosecute the suit and they failed to do so; that they were given a further 90 days by the High Court and again failed to comply; that it was only Maraga J, who could have extended the time as he was the one who had made the orders; and that the appellants and their counsel were indolent and equity does not favour the indolent.

[9] Having considered the record and the respective submissions by learned counsel, we find that there are two issues for determination. First, is whether the learned Judge, that is, Onyancha J, had jurisdiction to extend time; and secondly, is whether there was justification for extension of time as urged by the appellants.

[10] The Court's mandate on a first appeal is set out in **Rule 29(1)** of the **Court's Rules**, namely to re-appraise the evidence and to draw inferences of fact. Where the appeal calls for interrogation of the exercise of judicial discretion as in this case, the Court remains guided by the principles enunciated in **Selle v Associated Motor Boat Company Ltd [1968] EA 123** and **Pil Kenya Ltd Vs. Oppong [2009] KLR 442**; that the appellate court should not interfere unless it is satisfied that the trial judge misdirected himself in some material respect by either failing to take into account relevant matters or taking into account extraneous matters and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the trial judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

[11] This appeal raises the issue of jurisdiction and we take note of the following authorities: In **Owners of the Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Limited [1989] KLR 1** Nyarangi, JA cited with approval Words and Phrases Legally defined – Vol. 3:1 page 113 as follows:

*"By jurisdiction is meant the authority which a court has to decide matters that are before it or 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 both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given"....*

*The learned Judge had earlier expressed himself thus:-*

*"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".*

In **Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367**, the Court of Appeal expressed itself as follows:

*"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."*

[12] Similarly the Supreme Court in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR**, 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 No. 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.”***

[13] Thus the issue of jurisdiction having been raised we must deal with it first as it is now trite law that jurisdiction is everything, and a court must down its tools once it is satisfied that it has no jurisdiction. The learned Judge in his decision contended that he had no jurisdiction to grant the orders sought because a court of similar jurisdiction had heard the matter on appeal and ordered that the suit be prosecuted within 90 days. The learned Judge wondered whether in hearing the application he would be sitting on appeal of the said order or whether he would be setting it aside or varying the order.

[14] The application by the appellant for extension of time was brought under Order 50 Rule 6 of the Civil Procedure Rules which provides that:-

***Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise. (emphasis added)***

[15] Under **Section 2** of the **Civil Procedure Act** a Court means either the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. Adopting that interpretation a plain reading of **Order 50 Rule 6** of the **Civil Procedure Rules** means that time set by the order of the court may be enlarged by the court. Although the court includes a subordinate court exercising its civil jurisdiction, it would be clumsy for a subordinate court to interfere with an order made by a higher court and therefore where time is set by an order of the High Court, such an order ought to be enlarged by the High Court. In our view, **Order 50 Rule 6** of the **Civil Procedure Rules** does not restrict the power to extend time to the same Judge who set the time. Therefore where necessary, the same Judge or any other Judge of concurrent jurisdiction can make an order for extension of time. In hearing such an application for extension of time, another Judge will not be sitting on appeal in regard to the order made by the previous Judge, but will simply consider the application for extension of time based on the circumstances obtaining at that point in time including the previous time set and the reasons for failing to comply. We find that the learned Judge (Onyancha J.) was clothed with the Jurisdiction to enlarge time as requested by the appellants.

[16] On the second issue, that is, whether there was justification for extension of time as urged by the appellants, in his decision the learned Judge stated that even if he was wrong in concluding that he did not have jurisdiction he still could not exercise his discretion in favour of the applicant as the suit ceased to exist on 8<sup>th</sup> or 9<sup>th</sup> June, 2011 and there was nothing therefore to extend. The appellant argues that under **Order 50 Rule 6** of the **Civil Procedure Rules** the learned judge could have extended time even after expiration of the given time.

[17] While we concur that **Order 50 Rule 6** provides that an application for extension may be made even where the time allowed for the doing of the act has expired, the use of the word “*may*” is a clear indicator that the provision is only permissive and therefore discretionary and dependent on the peculiar circumstances of the case. The learned Judge of the High Court declined to exercise this discretion in the applicant’s favour because in his view there was no suit in existence for which time could be extended to prosecute. The orders made by Maraga J, were very clear and precise that failure to prosecute the suit within 90 days will result in the suit standing dismissed. The Orders were given on 9<sup>th</sup> March, 2011 the appellant therefore had until 9<sup>th</sup> June, 2011 to prosecute the suit. The appellants neither prosecuted their suit within the 90 days nor sought extension of time before the expiry of the 90 days or immediately thereafter. Their suit stood dismissed as at 10<sup>th</sup> June, 2011.

[18] In the premises the learned Judge cannot be faulted for declining to exercise his discretion in the appellant’s favour. Accordingly we find no merit in this appeal and dismiss it with costs.

***Dated and delivered at Nairobi this 29<sup>th</sup> day of July, 2016***

***H. M. OKWENGU***

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***JUDGE OF APPEAL***

***F. AZANGALALA***

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***JUDGE OF APPEAL***

***J. MOHAMMED***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**