



**Magogo & another v Jesus Teaching Ministry (JTM) (Through its Chairman,
Treasurer & Secretary) & 5 others (Environment and Land Appeal
E030 of 2023) [2024] KEELC 4719 (KLR) (14 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4719 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E030 OF 2023**

**EK WABWOTO, J
JUNE 14, 2024**

BETWEEN

SAMSON MAGOGO 1ST APPELLANT

FRANCIS MUREITHI 2ND APPELLANT

AND

**JESUS TEACHING MINISTRY (JTM) (THROUGH ITS CHAIRMAN,
TREASURER & SECRETARY) 1ST RESPONDENT**

COUNTY GOVERNMENT OF NAIROBI 2ND RESPONDENT

COUNTY PHYSICAL PLANNER, NAIROBI COUNTY 3RD RESPONDENT

COUNTY LAND SURVEYOR NAIROBI COUNTY 4TH RESPONDENT

KENYA URBAN ROADS AUTHORITY 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

*(Being an appeal from the Orders issued by Hon. Hosea Mwangi
Nganga (PM) on 20th March 2023 in Milimani MCELC E109 of 2023)*

JUDGMENT

1. This is an appeal against the Orders issued by Hon. Hosea Mwangi Nganga (PM) on 20th March 2023 in Milimani MCELC E109 of 2023 in which the Learned Magistrate issued temporary injunctive orders against the Defendants restraining them from further building, putting up permanent or temporary structures, encroaching, digging, obstructing, enclosing or otherwise interfering with the public road situated off Manyanja road leading to Jesus Teaching Ministry Canaan grounds, Donholm pending the hearing and determination of the application. The Learned Magistrate also issued orders



that the temporary injunctive orders issued, should not be interpreted or construed as an eviction or demolition order and is only limited to stopping any further construction on the alleged public road until further orders are issued.

2. The Appellants being aggrieved with the said orders filed this appeal through a Memorandum of Appeal dated 27th March 2023. The following grounds were raised in the Appeal:-
 1. The trial Magistrate erred in law and in fact by failing to find that it lacked the requisite pecuniary jurisdiction to hear and determine the suit, as the value of the suit property is over Kshs. 20,000,000/=.
 2. The trial Magistrate erred in law and in fact by issuing injunctive orders ex-parte without satisfying himself that the Applicant was a legitimate complainant, with a genuine grievance capable of being redressed as no document of ownership of the property allegedly occupied by the Applicant was produced before court.
 3. The trial Magistrate erred in law and in fact by elevating the interests of the Applicant above the interests of the Applicants as well as over 300 members of Savanna Community Smallscale Traders Group, the legitimate occupiers of the headland between Harambee Sacco and Donholm Estate off Manyanja Road pursuant to a lawful Temporary Occupation Licence issued by a competent authority and/or body.
 4. The trial Magistrate erred in law and in fact by issuing the draconian orders on the premise that the Applicants as well as members of Savanna Community Smallscale Traders Group were undertaking unlawful construction on a public road.
 5. The trial Magistrate erred and in law in exercising discretion in favour of the Applicant whose hands were tainted as the Applicant has established a church on public property and whose perimeter wall has encroached on a public road, the wayleave and blocked the drainage system, facts which were conveniently concealed from the court by the Applicant.
3. On the basis of those grounds, the Appellant sought the following reliefs:-
 - a. That the appeal herein be allowed and the orders issued by Hon. Hosea Mwangi Nganga (PM) on 20th March 2023 be set aside and or vacated.
 - b. That this Honourable Court be pleased to find that the Trial Magistrate lacks the requisite pecuniary jurisdiction to hear and determine this matter.
 - c. That costs of this appeal be provided for.
 - d. Any other relief as the court may deem fit and just to grant.
4. The appeal was canvassed through written submissions. The Appellant relied on their written submissions dated 3rd May 2023. The 1st Respondent filed within submissions dated 17th May 2023 and the 2nd and 4th Respondents filed written submissions dated 30th May 2023.
5. The Appellant outlined a single issue for determination and submitted that the Learned Magistrate lacked jurisdiction to hear the matter before his court. It was submitted that Section 7(1) of the *Magistrate's Court's Act*, caps the jurisdiction of a Chief Magistrate's Court at Kshs. 20,000,000/= and that in the instant matter, the Appellants have produced before court a Valuation Report dated 27th March 2023 which is on record. The said Valuation Report values the subject property at Kshs. 22,100,000/= and the same has not been challenged by the Respondents herein.



6. It was argued that on account of pecuniary jurisdiction of the trial court, the suit and the proceedings before the lower court are void ab initio and any orders issued therein must as of necessity be set aside and or vacated. The Appellants cited the Supreme Court case of *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others* (2014) eKLR where it was held inter alia that the issue of jurisdiction can be raised at anytime, in the trial court, on appeal or in the Supreme Court for the first time.
7. The 1st Respondent submitted on the following issues in their submissions dated 17th May 2023: -
 - i. Whether Jesus Teaching Ministry (JTM) has the locus to institute the trial proceedings.
 - ii. Whether the trial court has jurisdiction.
 - iii. Whether the impugned injunctive orders were issued exparte.
 - iv. Whether the impugned injunctive orders were merited.
 - v. Whether the Appellants are liable for contempt.
8. It was argued that the 1st Respondent herein has a legitimate interest in the suit property since it is the bonafide proprietor of all those parcels of land known as LR No. Nairobi Block 82/9402, LR No. Nairobi Block 82/9403 & LR No. Nairobi Block 82/9404 which were realized from the subdivision of all that property formerly known as LR No. Nairobi/block 82/8760. The said parcels are adjacent to the suit premises and JTM enjoys a public right of way (easement right) over the public road, given that it is the major access road used by thousands of congregants to access the church situated on the said parcels of land. The 1st Respondent argued that it instituted the proceedings at the trial court seeking to enforce their easement rights and challenge the Appellant's unlawful construction on the public road, especially given that the same posed public health and safety risks arising from the pedestrian and motorist traffic congestion.
9. In respect to the valuation report, it was argued that the Appellants unilaterally proceeded to commission a valuation of a public road without the involvement of the relevant agencies. It was also averred that the same was introduced on appeal thus denying the Respondents an opportunity to cross-examine the makers of the report.
10. On whether or not the injunctive orders were issued exparte, it was argued that the Appellants were absent on 20th March 2023 despite service when the said injunctive orders were issued and as such their right to fair hearing was not violated in any way.
11. Relying on the cases of *East African Industries v Trufoods* [1972] EA 420, *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, it was submitted that the 1st Respondent had satisfied the court when it had issued the impugned injunctive orders and the same were merited.
12. The 1st Respondent also submitted that the Appellants are guilty of contempt as they continued developing the suit property despite the orders that were issued by the court. It was also submitted that the Appellants Advocates were in court on 19th April 2023 when the orders were issued and had sufficient knowledge of the same. The court was urged to cite the Appellants for contempt and dismiss the Appeal with costs to the 1st Respondent.
13. The 2nd, 3rd and 4th Respondents filed written submissions dated 30th May 2023 and submitted on the following issues; whether the trial Magistrate has jurisdiction to determine this dispute and whether the Appellants entitled to the orders sought.



14. Relying on Section 9(a) of the *Magistrate's Court Act* and *Law Society of Kenya, Nairobi Branch v Malindi Law Society & 6 Others* [2017] eKLR, it was submitted that the Magistrate's court has jurisdiction to hear and determine disputes regarding environmental and land matters. The dispute herein is on encroachment by the Appellants on a public road in contravention of terms of an occupation license issued to the Appellants by the 2nd Respondent and the value of the property occupied by the Appellants is therefore immaterial. The claim before the trial court concerns encroachment on a public road in contravention of the Temporary Occupation License (TOL) dated 11th March 2014 and neither relates to ownership of the Appellants' property nor the public road in question and in the circumstances the trial court has jurisdiction to hear the suit.
15. On whether the injunctive orders issued were merited, it was argued that the *ex parte* order of injunction was merited since it was against the continued construction on the public road thus blocking access and infringing on the temporary occupation license issued by the Appellants and limiting the accessibility of the neighbouring area by the public. The court was urged to dismiss the appeal with costs.
16. The court has considered the record of appeal and written submissions filed by the parties and has outlined the following salient issues for determination:-
 - i. Whether the trial Magistrate had jurisdiction to hear and determine the dispute.
 - ii. Whether the trial court erred in granting the impugned injunctive orders.
17. The court shall proceed to analyse the said issued sequentially.
18. In the case of In the case of the *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* [1989]KLR 1, Nyarangi JA stated as follows:

“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.”
19. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court stated *In the Matter of Interim Independent Electoral Commission* [2011] eKLR as follows:
 - “29. Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that 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. Without it, a Court has no power to make one more step.”
 30. The *Lillian 'S'* case 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 case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

20. Parties are, therefore, expected to raise the issue of jurisdiction at the earliest opportunity. However, since jurisdiction goes to the question of judicial authority to decide a matter on its merits, courts have been consistent that the issue of jurisdiction can be properly raised by a party at any stage – including on appeal. Hence, in *Floriculture International Ltd v Central Kenya Ltd & 3 Others* [1995] eKLR, the Court of Appeal held that the issue of jurisdiction can be argued at any time. The Court remarked as follows:

“It has been held in the case of *Kenindia Assurance Co. Ltd v Otiende* [1989] 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction.”

21. The judicial system in Kenya includes the Magistrates’ courts as established under Article 169 of the *Constitution of Kenya*, 2010. Pursuant to Article 169 (2), parliament is mandated to enact legislation conferring jurisdiction, functions and powers on the magistrates’ courts. In that regard parliament legislated the following provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011:

- (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
- (4) Subject to Article 169(2) of the *Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
- (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
- (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the *Magistrates’ Courts Act*.

22. The Chief Justice has, by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011. Such gazette notices include Gazette Notice No. 1472 dated 1st March 2016, Gazette Notice No. 1475 dated 1^{4th} March 2016, Gazette Notice No. 11930 dated 5th December, 2017 and Gazette Notice No. 2575 dated 28th February, 2019. Thus, there exist within the magistrates’ courts, several magistrates duly gazetted and granted jurisdiction and power to handle cases involving occupation and title to land. Some four years after enactment of the *Environment and Land Court Act*, 2011, parliament also enacted the *Magistrates’ Courts Act*, 2015 so as to among others give effect to Articles 23 (2) and 169 (1) (a) and (2) of the *Constitution* and to confer jurisdiction, functions and powers on the magistrates’ courts. The *Act* came into operation on 2nd January, 2016 and its Section 9 (a) provides:

A magistrate’s court shall -

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -



- (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- (ii) compulsory acquisition of land;
- (iii) land administration and management;
- (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- (v) environment and land generally.

23. The upshot of the provisions at Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates' Courts Act*, is that magistrates who are duly gazetted have the requisite pecuniary jurisdiction and power to handle cases involving land.
24. As per the plaint filed before the trial court, the dispute between the parties relates to encroachment over the public road situated off Manyanja road, leading to Jesus Teaching Ministry (JTM) Canaan Ground Donholm Nairobi. It was averred that the 1st and 2nd Appellants on diverse dates of March 2023 have and continue to build a permanent concrete building over the public road and substantially limiting the use and enjoyment of the public road by members of the public. Pursuant to the same declaratory and injunctive orders were sought as against the Appellants and other parties.
25. There was no dispute as to ownership of any suit property to warrant the parties to submit a valuation report upon which the trial court would have considered the pecuniary value of the property. In view of the foregoing, the Appellants contention that the trial court had no jurisdiction to hear the suit is misplaced.
26. On whether the trial court erred in granting the injunctive reliefs sought, it is worth noting that the Appellants were aggrieved by the grant of the temporary injunctive orders. As has also been restated in the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA, a court sitting on Appeal will not interfere with a discretionary decision appealed from simply on the ground that the court, if sitting at first instance, would or might have given different weight to that given by the court to the various factors in the case.
27. This court sitting of Appeal is only entitled to interfere if one or more of the following matters are established; first, that the court misdirected himself in law; secondly, that the court misapprehended the facts; thirdly, that the court took account of considerations of which he should not have taken account; fourthly, that the court failed to take account of considerations of which he should have taken account, or fifthly, that the court's decision, albeit a discretionary one, is plainly wrong. As earlier observed, one of the issues in this interlocutory appeal is whether the lower court erred in the exercise of its discretion in declining to grant the appellant the interlocutory relief of an injunction.
28. The lower court was invited to exercise discretionary jurisdiction. Sir Charles Newbold P. outlined the following principle in *Mbogo & Another v Shah* [1968] EA 98 which guides our appellate courts when exercising appellate jurisdictions over discretionary decisions of lower courts:

“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 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. The Court of Appeal emphasized this principle in *Nguruman Limited v Jan Bonde Nielsen & 2 others* C A No 77 of 2012 [2014] eKLR in the following words:-

“This dictum underlines what is well settled in our laws that as an appellate court, this court has a limited function in an appeal from the grant or refusal of an order of injunction issued by the court below. It has no jurisdiction to exercise an independent original jurisdiction of its own. It must defer to the exercise of jurisdiction by the judge in the court below and must not interfere with it merely upon the ground that the members of this court would have exercised the discretion differently.”

30. A party is required to satisfy the criteria upon which jurisdiction to grant an interlocutory injunction is granted. The criteria was outlined in the often cited case of *Giella v Cassman Brown* [1973] EA 358. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate to the court that if the interlocutory injunctive relief is not granted, he would stand to suffer damage that may not be indemnified through an award of damages. Third, should the court have doubt on the applicant’s satisfaction of both or either of the above requirements, the application is to be determined based on the balance of convenience. Last, at the stage of disposing the plea for an interlocutory injunction, the court seized of the application does not make definitive or conclusive pronouncements on the key issues in the suit.

31. In *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018]eKLR the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

32. In the instant appeal, the material on record shows that the injunctive orders were issued against the Appellants stopping further construction and on encroachment on a public road which construction activities were affecting access of the wider members of the public. This particular position has not been disputed by the Appellants in this appeal and as such this court is satisfied that the trial court properly exercised its discretion judiciously in granting the said orders and has no reason to interfere with the same. For the above reasons, this court cannot fault the lower court in the manner it exercised its discretionary jurisdiction.

33. On the issue of costs, by dint of the provisions of Section 27 of the *Civil Procedure Act*, costs are at the discretion of the court. In the instant appeal, having considered that this is an appeal from interlocutory proceedings and the matter is still pending before the subordinate court, I will direct each party to bear own costs of the appeal.

Final orders

31. In conclusion, it is the finding of this court that the entire appeal is unmeritorious and the same is dismissed with an order that each party bears own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 14TH DAY OF JUNE, 2024.



E. K. WABWOTO

JUDGE

In the presence of:-

N/A for the Appellants.

N/A for the 1st Respondent.

Dr. Omondi Owino for the 2nd to 4th Respondents.

Court Assistant: Caroline Nafuna.

