



**Kamau v Mbutia (Personal representative of the Estate of Francis Njiru Njagi) (Land Case Appeal E083 of 2024) [2024] KEELC 6861 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6861 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**LAND CASE APPEAL E083 OF 2024**  
**MD MWANGI, J**  
**OCTOBER 17, 2024**

**BETWEEN**

**DANIEL NG'ANG'A KAMAU ..... APPELLANT**

**AND**

**CATHERINE MUTHONI MBUTHIA (PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS NJIRU NJAGI) ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The appeal before me, I must say, is rather interesting. The Appellant who was the Plaintiff in the case appealed from, before the Chief Magistrate's Court, (Milimani Chief Magistrate's Court Civil Case No. 2339 of 2012), filed his Memorandum of Appeal dated 13th June 2024, appealing from the judgment of Honorable S. A. Oponde (PM). He prays that the trial court's finding that it lacks jurisdiction to hear and determine his case be set aside and be substituted with an order confirming and affirming that the trial court's jurisdiction to hear and determine the primary suit was properly invoked. The Respondent, who was the Defendant in the primary suit too filed a cross-appeal dated 2nd July 2024. The Respondent seeks the same order as the Appellant; that the judgment delivered on 22<sup>nd</sup> May 2024 by Honorable S. A. Oponde (Principal Magistrate), be set aside and this court makes a finding that the trial court has the jurisdiction to hear and determine the suit before it, which jurisdiction was properly invoked.
2. Essentially, both parties agree that the trial court had the jurisdiction to hear and determine the suit presented before it. The Advocates representing the parties confirmed as much when they appeared before this court and invited this court to determine the appeal and the cross- appeal with that in mind.
3. The issue then for determination is whether the trial court had the jurisdiction to hear and determine the case between the Appellant and the Respondent.



## Determination

4. Order 42, rule 31 of the Civil Procedure Rules contemplates the scenario in this matter. It provides as follows;

“ ... if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in the appeal, the court to which the appeal is preferred may pass a decree or make an order accordingly.”

5. From a perusal of the pleadings filed before the trial court, the claim by the Appellant against the Respondent was for trespass to land. The Appellant’s allegation was that he had entered into a ‘license agreement’ with the Respondent for ten (10) years from 29-7-2009 to 29-7-2019. The license according to the Appellant determined on 29-7-2019. However, he asserted that the Respondent refused to give vacant possession upon the determination of the license thereby becoming a trespasser. He therefore sought an eviction order and an order of demolition of all buildings and structures in the suit property erected by the Respondent amongst other orders including mesne profits and general damages for trespass.
6. The Respondent in response to the Appellant’s claim insisted that she was a tenant enjoying a periodic tenancy and sought a declaration to that effect in her counterclaim amongst other orders.
7. One of the issues then that the trial court was to determine was whether the Respondent was a trespasser. In his judgment, however, the learned Magistrate determined that he had no jurisdiction since;

“ the lease which the parties had admitted was executed and dated 29-7-2019...” (provided that the premises) ...was to be used as a shop within the meaning of the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act*, Cap 301.”

8. The learned Magistrate observed that though none of the parties had raised the issue of jurisdiction, he could not ignore the glaring fact that he was not clothed with the jurisdiction to entertain the matter before him.
9. The learned Magistrate proceeded to determine the issue of jurisdiction without affording the parties an opportunity to ventilate on it. In my view, that was a grave omission on the part of the learned Magistrate. It amounts to a denial of the right to be heard.
10. I must emphasize that the right to be heard is a basic natural justice right that must not be taken away lightly from any party to a civil suit. The Court of Appeal addressed this issue in the case of *Mutiso v Mutiso* (1984) eKLR, and held that it is a fundamental principle of justice that before an order or decision is made, the parties, and particularly the party against whom the decision is to be made should be heard before the decision is made.
11. The learned Magistrate should have, upon arriving at the conclusion that the issue of jurisdiction was pertinent, paused writing his judgment and invited the parties to address him on the issue before making a decision on it.
12. In any event, this court agrees with the parties herein that their court was duly seized of the matter as presented by the parties. It had the jurisdiction to hear and determine the issues therein. As I already pointed out, the claim by the Appellant against the Respondent was for trespass to land. I will say no more in order not embarrass the case of any party or prejudice any party for that matter because the dispute is yet to be determined.



13. Consequently, I will allow the appeal by the Appellant as well as the cross- appeal by the Respondent but with no orders as to cost.
14. The upshot is that the judgment delivered on 22<sup>nd</sup> May 2024 by Honorable S.A. Opande, (PM), is hereby set aside in its entirety. This court finds and holds that the trial court has jurisdiction to hear and determine the suit, Chief Magistrate's Court Civil Case No. 2339 of 2012.
15. The Appellant has invited this court to determine the dispute between the parties at this juncture under the provisions of section 78(1)(a) of the *Civil Procedure Act*. In as much as the Court has the power to do so, the appropriate order for this court to issue is an order remitting the case to the Chief Magistrate's Court for writing and delivery of a judgment by any other Magistrate other than Honorable Opande. The Magistrates' court, being the trial court, will be at liberty to make all appropriate orders as it deems necessary to enable it deliver on its mandate as a trial court.

It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Otieno h/b for Mr. Njoroge for the Appellant

N/A for the Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE

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