



**Kanyi v Kariuki & another (Environment and Land Appeal E042 of 2023)  
[2024] KEELC 13259 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13259 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL E042 OF 2023  
SM KIBUNJA, J  
NOVEMBER 20, 2024**

**BETWEEN**

**DAVID MUREITHI KANYI ..... APPELLANT**

**AND**

**RAHAB NYANJAU KARIUKI ..... 1<sup>ST</sup> RESPONDENT**

**IRENE MAINA T/A IRENE MAINA CO ADVOCATES ..... 2<sup>ND</sup> RESPONDENT**

*((Appeal from the Judgment of Hon. J.B Kalo, CM, in Mombasa CMCC NO. E194 of 2022: Rahab Nyanjau Kariuki versus David Mureithi Kanyi & Irene Maina T/A Irene Maina & Co Advocates, delivered on 30th November 2023))*

**JUDGMENT**

1. This appeal was instituted vide a Memorandum of Appeal dated 7<sup>th</sup> December 2023, raising five (5) grounds that:
  - a. The learned trial magistrate erred in law and in fact by failing to determine whether the trial court had the requisite jurisdiction to hear and determine the suit.
  - b. The learned trial magistrate erred in law and in fact by holding that the appellant's defence was a general denial of the respondent's claim.
  - c. The learned trial magistrate erred in law and in fact by failing to find that the appellant had contested the court's jurisdiction in his defence.
  - d. The learned trial magistrate erred in law and in fact by failing to determine the preliminary objection first.
  - e. The learned trial magistrate erred in law and in fact by awarding the 2<sup>nd</sup> respondent costs against the appellant.



The appellant prays for:

- i. This appeal to be allowed.
  - ii. The court to set aside the judgment in Mombasa CMCC E194 of 2022 Rahab Nyanjau Kariuki versus David Mureithi Kanyi & Irene Maina T/A Irene Maina & Co Advocates delivered on 30th November 2023 and the consequential decree thereto.
  - iii. The appellant's preliminary objection raised therein to be allowed.
  - iv. Costs of this appeal.
2. The appellant also filed the record of appeal dated 31<sup>st</sup> January 2024, in support of the appeal, and from the pleadings therein, the suit before the lower court was filed vide a plaint dated 9<sup>th</sup> February 2022 by the 1<sup>st</sup> respondent herein as the plaintiff, against the appellant and 2<sup>nd</sup> respondent as the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively. The 1<sup>st</sup> respondent inter alia averred that she entered into an agreement on or about 14<sup>th</sup> October 2016 with the appellant, to purchase nassionate numbers 8 & 9 on LR 11526/I/MN, and paid Kshs.1,900,000 that was acknowledged through a receipt from the 2<sup>nd</sup> respondent's office. That the sale agreement was drawn by the 2<sup>nd</sup> respondent. She contended that despite making the payments, the appellant has not commenced the construction of the said apartment, and she prayed for judgement against the appellant and 2<sup>nd</sup> respondent inter alia for special damages of Kshs 1,900,000, interests at commercial rates and costs.
3. The appellant and 2<sup>nd</sup> respondent jointly filed a statement of defence dated 3<sup>rd</sup> March 2023, inter alia averring that the 2<sup>nd</sup> respondent was an advocate in the transaction, while the appellant was the vendor. That the 1<sup>st</sup> respondent entered into the agreement of sale willingly, without coercion or misrepresentation. That the court's jurisdiction is disputed as the sale agreement had a valid arbitration clause, and the suit should be dismissed with costs. The appellant filed a Notice of Preliminary Objection dated 14<sup>th</sup> April 2022 seeking for the suit to be dismissed with costs in view of the arbitration clause R in the parties sale agreement that had not been exhausted.
4. Directions on filing and exchanging submissions were given on the 17<sup>th</sup> July 2024, subsequent to which the learned counsel for the appellant and 1<sup>st</sup> respondent filed their submissions dated the 13<sup>th</sup> August 2024 and 20<sup>th</sup> August 2024 respectively, which the court has considered.
5. The following are the issues for the court's determinations in this appeal:
- a. Whether the trial court was with jurisdiction to hear and determine the suit in view of the arbitration clause in the sale agreement between the appellant and 1<sup>st</sup> respondent.
  - b. Whether the learned trial magistrate misapplied or misapprehended the facts and the law in coming to the decision appealed against.
  - c. Who pays the costs?
6. The court has carefully considered the grounds on the memorandum of appeal, the record of appeal, submissions by both learned counsel, superior courts decisions cited thereon, and come to the following findings:
- a. The role of this court as a first appellate court is to re-evaluate and reconsider the evidence on record, because it did not see or hear the witnesses testify first-hand. This was the position in



taken in the case of Kenblest Kenya Limited versus Musyoka Kitema [2020] eKLR where the court held,

“As a first appellate court, this court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand. This is captured by Section 78 of the *Civil Procedure Act* which espouses the role of a first appellate court which is to: ‘..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’ This was buttressed by the Court of Appeal in the case of Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:

“We have also, as we are duty bound to do, as a first appellate court, to reconsider the evidence adduced before the trial court and reevaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See *Ngui V Republic*, (1984) KLR 729 and *Susan Munyi V Keshar Shiani*, Civil Appeal No. 38 of 2002 (unreported).”

- b. The copy of the typed proceedings in the record of appeal confirms that the 1<sup>st</sup> respondent testified as PW1 on the 30<sup>th</sup> March 2023, while the 2<sup>nd</sup> respondent testified as DW1 on the 2<sup>nd</sup> August 2023. Thereafter the court directed the learned counsel “to file and exchange submissions on the main suit and preliminary objection within 28 days.” The learned counsel for the defendant and plaintiff filed their submissions dated the 14<sup>th</sup> September 2024 and 19<sup>th</sup> September 2024 respectively.
- c. The proceedings of 30<sup>th</sup> March 2023 confirms that the learned counsel had alerted the court of the defendants’ objection to the court’s jurisdiction. The learned counsel for the plaintiff indicated their preparedness to proceed with the hearing of the main suit and expressed their preparedness “to take the repercussions of the matter proceeding with the preliminary objection on the file.” The court then directed the hearing to proceed and PW1 testified.
- d. In his judgement that is at pages 87 to 89 of the record of appeal, the learned trial magistrate identified only one issue for determination that is; “whether the plaintiff has proved her case against the defendants or any one of them.” The learned trial magistrate then proceeded to analyse the evidence presented and made a finding in favour of the 1<sup>st</sup> respondent against the appellant; dismissed the case against the 2<sup>nd</sup> respondent, and awarded her costs against appellant. It is crystal clear that the learned trial magistrate did not at all address and determine the issue of whether or not the court was with jurisdiction in view of the arbitration clause in the parties’ sale agreement.
- e. Ordinarily or ideally, preliminary objections once raised should be decided first before the court moves to other issues. This is especially so when the grounds raised are likely, if upheld to determine the cause, like where it involves the court’s jurisdiction. In the case of *Agnes Wachu Wamae & 97 Others Versus Barclays Bank Kenya Limited* Supreme Court of Kenya Petition No. 19 (E022) of 2020, the court restated the principles to be considered in preliminary objections as follows:

“18. The principles established by the time-honoured, *Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors* (1969) EA 696, cited with approval by this court in *Hassan Joho* case (supra) are settled that:



“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ....a preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which if argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The goal of preliminary objection is to resolve the issues raised at the earliest opportunity before moving forward with the substantive aspects of the case. In this suit, though the defendants had raised the issue of the court’s lack of jurisdiction through paragraph 7 of the statement of defence dated 3<sup>rd</sup> March 2023, notice of preliminary objection dated the 8<sup>th</sup> March 2023, defendants’ counsel oral submission just before the testimony of PW1 was taken on 30<sup>th</sup> March 2023, and through the written submissions dated 14<sup>th</sup> September 2024, there was no determination made on the issue all through to the judgement of 30<sup>th</sup> November 2023.

- f. The failure by the learned trial magistrate to determine the preliminary objection vitiates the decision arrived thereof as the court was obligated to make a determination on jurisdiction before moving to a determination of the plaintiff’s/1<sup>st</sup> respondent’s claim. In the case of *Owners of Motor Vessel “Lilian S” versus Caltex Oil (Kenya) Limited [1989] eKLR*, the court held that:

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

As the proceedings before the trial court show that the preliminary objection was to be heard and determined alongside the main suit, the learned trial magistrate should have dealt with the issue of whether or not the court had jurisdiction in the matter in view of the existing clause “R” in the parties’ sale agreement. The failure to do so was a misdirection and misapprehension of the law by the learned trial magistrate, and vitiates the decision arrived at. This finding suffices to dispose of this appeal, and the appeal has merit.

- g. That as the trial court did not address itself to the question of jurisdiction that is apparent at paragraph 7 of the statement of defence and notice of preliminary objection filed, it is only fair that the suit be remitted back for fresh hearing before another magistrate other than Hon. J. B. Kalo, CM.
- h. Under section 27 of Civil Procedure Rules chapter 21 of Laws of Kenya costs follow the events unless otherwise ordered for good cause. In this instance, I find the failure by the trial court not to pronounce itself on the question of jurisdiction cannot be blamed on any of the parties. Accordingly, I find it fair and just for each party to bear their own costs.
1. Flowing from the above determinations, the court find and order as follows:



- a. That this appeal is allowed and the judgement delivered by Hon. J. B. Kalo, CM in Mombasa CMCC No. E194 of 2022, on 30<sup>th</sup> November 2023 is set aside in its entirety.
- b. That in terms of section 78 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the suit is hereby remitted back to the trial court for a new trial and determination of the Appellant's/1<sup>st</sup> defendant's preliminary objection, before another magistrate other than Hon. J. B. Kalo, CM.
- c. Each party to bear their own costs in this appeal.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 20<sup>TH</sup> DAY OF NOVEMBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Appellant : No Appearance

Respondents : Mr. Otieno for Gikandi for 1<sup>st</sup> Respondent

Leakey – Court Assistant.

S. M. Kibunja, J.

