



**M'Arimi v Farah (Substituted by Mohamed & another) (Environment and Land Appeal 10 (E008) of 2021) [2024] KEELC 13239 (KLR) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13239 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 10 (E008) OF 2021  
FO NYAGAKA, J  
NOVEMBER 18, 2024**

**BETWEEN**

**GIDIEL MWITI M'ARIMI ..... APPELLANT**

**AND**

**HALIMA MOHAMED FARAH (SUBSTITUTED BY YUSUF ALI MOHAMED AND MOHAMED ALI MOHAMED) ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. M. K. Mwangi, Chief Magistrate Lodwar in CMC Land Case No. 3 of 2019, delivered on 17th September, 2021)*

**JUDGMENT**

1. The Appellant filed the instant Appeal against the judgment of the Honorable M. K. Mwangi, Chief Magistrate, Lodwar, delivered on 17/09/2021 in CMC Land Case No. 3 of 2019, between Halima Mohammed Farah and Gidiel Mwiti M'Arimi. Halima Mohamed was the Plaintiff who, after the instant appeal was filed, died during its pendency. She was substituted with one Yusuf Ali Mohammed and Mohammed Ali Mohammed the legal representatives of the deceased vide the orders of this court made on 23/04/2024.
2. Briefly her case was that on 27/02/2013 she purchased Plot No. 51C located in Lodwar town from one Omar Abdi Noor. In 2016, the Defendant started to encroach onto the said plot. The plaintiff lodged a complaint to the Ministry of Lands, Turkana County, but the Defendant refused to vacate. He started erecting permanent structures on the parcel of land. Her efforts to resolve the matter did not bear fruit. She claimed against the Defendant for an order of injunction to restrain him from continuing to encroach on her plot. Specifically, she prayed for the relief of an order of injunction against the Defendant, his servants, agents, assents, and or any other person in that behalf from encroaching, trespassing upon, entering to, wasting or utilizing, assigning, selling and/or transferring the same property. She also prayed for the cost of the suit.



3. The Defendant's case was that he was the 4<sup>th</sup> owner of the land in dispute, it having changed hands three times before and the previous owners had never had any dispute with the Defendants. Further, that plot Nos. 51 C and 51 were fully developed in 1970. The Defendant was only renovating part of his rear L-shaped plot and creating a small room. He averred that the Plaintiff was on an unlawful mission to claim plot No. 51 which did not even share the boundary with the Plaintiff's. He prayed that the suit be dismissed with costs.
4. The suit proceeded to full trial. The learned trial magistrate rendered his judgment on the date stated above, allowing the Plaintiff's claim in entirety and awarding costs to her. Following the judgment, the Defendant preferred the instant appeal.
5. He filed a Memorandum of Appeal dated 20/09/2021 the same date. He listed several grounds which were that the learned trial magistrate erred in law and fact in:-
  1. Holding that the Respondent had proved her case on a balance of probabilities in the absence of any credible evidence to that effect.
  2. Relying on a "transfer letter" dated 27<sup>th</sup> February, 2013 produced by the Respondent as an agreement for sale whereas the documents did not contain any particulars, that is to say, the number or acreage of the land sold to the Respondent.
  3. In putting weight on a purported biased survey report produced by PW2 Joseph Equiron touching on Plot No. 51C whereas the dispute was between the Appellants Plot 51 and 51C without regard to the fact that the witness visited the site in dispute in the absence of the appellant.
  4. In failing to consider the evidence by the Defence thus arriving at a wrong decision.
  5. In holding that the Appellants plot was not L-shaped in the absence of any evidence to the contrary.
  6. In failing to find that he had no jurisdiction to determine a boundary dispute.
  7. In failing to do a proper analysis of the pleadings and the evidence before arriving at his own conclusion.
  8. The absence of an agreement for sale on the part of the Respondent and the failure to call Omar Abdi Noor be more or allegedly sold Plot 51 C to her, they learned, trial magistrate misdirected himself in holding that the respondent had proved balance of probabilities.
  9. Then on it. The judgment was against the weight of evidence.
6. For the above reasons, the Appellant prayed that the appeal be allowed in entirety and the judgment of the lower Court be set aside and substituted with an order dismissing the suit with costs.
7. The Appeal was disposed of by way of written submissions. The appellant filed his submissions undated. The respondent failed theirs dated 25/09/2024. This will consider the submissions in the determination it makes below.

### **Issue, Analysis And Determination**

8. This being the first appellate court in this matter, it has the duty to reevaluate the evidence and come up with its own conclusions. However, in so doing it ought not interfere with the findings of the trial court unless the same were based not on the law or no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. For this holding the parties are



invited to refer to the guidance in the authorities of *Sumaria & Another vs. Allied Industrial Ltd* (2007) 2KLR and *Selle & Another vs. Associated Motor Boat Co. Ltd. & Others* (1968) EA, 123.

9. Before the court proceeds to analyze the merits of the evidence adduced before the trial court it is important to first, dispose of the point of law raised by the Appellant at Ground 6 of the Memorandum of Appeal that the trial court did not have jurisdiction to hear the matter. This is because if it succeeds then there is no need for this court to take its time to analyze the evidence that was received by a Court which did not have jurisdiction to receive it in the first place.
10. Jurisdiction is everything. In that regard, any determination a court makes has to be in line with a basis in the law that the body had authority to do so. It is a point of law which ought to be raised at the very beginning of a matter. However, it does not mean that failure raises such an issue right from the start estoppes the party or any other person from raising it at any stage of the proceedings, including appeal. This is because jurisdiction can neither be conferred by consent of the parties, nor can it be arrogated by the court. It is authority conferred on a judicial body by none other than the *Constitution* or the law given that the judicial body is a creature of the law, and the law therefore circumscribes its delineation or sphere of action and influence by way of decision-making or what it can and cannot do. So much so that if the court is precluded from hearing a matter, that is so and shall remain to be so irrespective of whether parties did not point it to the Court or the Court has pronounced itself on the matter. Put in another way, the decision that a court without jurisdiction is nullity. This is because, the Court does not have to depend on the parties to bring it to its attention that it lacks jurisdiction. The Court is learned in the law and is not expected to err on such a simple straight forward point of the law.
11. In the instant appeal. The Appellant did not submit on an important issue like this even though they raised it in the Memorandum of Appeal.
12. On their part, the Respondents argued that every court must be clothed with the requisite jurisdiction before entertaining a matter before it. But in the instant case, the Appellant did not object to the jurisdiction of the court, and neither did he raise it before that trial court. He argued that to raise it at this stage was a misplaced point and argument. He relied on the case of *The Owners of Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Limited* [1989] KLR 1. They also relied on Section 150 of the *Land Act* which confers jurisdiction of the court to handle matters such as the one before the Court and Section 9 of the *Magistrate Court Act*. They also relied on Section 26(4) of the *Environment and Land Court Act* and concluded that encroachment and trespass are disputes relating to the use and occupation of land hence they fall squarely within the jurisdiction of the court.
13. It is beyond peradventure that jurisdiction of a Court is everything to do with the whole dispute the judicial body is handling. In addressing a similar objection (on jurisdiction) Mrima J, in *Benson Makori Makworo v Nairobi Metropolitan Services & 2 Others* [2022] eKLR stated as follows:

“I will, however, briefly reiterate what the Court of Appeal stated in Nakuru Civil Appeal No. 119 of 2017 *Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others* consolidated with Civil Appeal No. 139 of 2017 *County Government of Embu & Another vs. Eric Cheruiyot & 15 Others* (unreported) in a decision rendered on 8<sup>th</sup> February, 2022 on the doctrine of jurisdiction in general as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft



Saunders in “*Words and Phrases Legally Defined*”, Volume 3 at Page 113 defines court jurisdiction as follows:

By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the 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 kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both 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 a 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.

37. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1. Nyarangi, JA. relying, inter alia, on the above cited treatise by John Beecroft Saunders held 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

38. A decision made by a court of law without proper jurisdiction amounts to a nullity ab initio, and such a decision is amenable to setting aside ex debito justitiae.
39. The Supreme Court in *In the Matter of Interim Independent Electoral Commission* [2011] eKLR, Constitutional Application No. 2 of 2011 held that jurisdiction of courts in Kenya is regulated by the Constitution, statute, and principles laid out in judicial precedent. The Supreme Court at paragraph 30 of its decision held in part as follows:

...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.

40. In *Samuel Kamau Macharia and Another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Application No. 2 of 2011, the Supreme Court reiterated its holding on a court’s jurisdiction. *In the matter of the Interim*



*Independent Electoral Commission* (supra) at paragraph 68 of its ruling, the Supreme Court held as follows:

(68). 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 itself jurisdiction exceeding that which is conferred upon it by law.”

14. Also, the Supreme Court of Kenya, in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR held 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.”

15. Turning to the instant Appeal, the Appellant raised the point that the trial court lacked jurisdiction because the issue raised in the suit lay within the mandate of the Land Registrar. According to him, the issue revolved around a boundary dispute. Although he did not submit on the point to show to the Court how the trial Court did not have jurisdiction, this Court carefully considered the law regarding the jurisdiction of the Court in relation to boundary disputes. It deduced that such an argument can only derive from the provisions of Section 18 (2) of the Land Registration Act. The relevant Sub-section provides as follows:

”the court shall not entertain any action or other proceeding relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section”

16. The part of the Section the sub-Section above refers to is Section 18(1) and (3). They provide that:

“(1) Except where, in accordance with Section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:”

17. It is plain from the provisions above that there are two parts in relation to the ouster of the Court’s jurisdiction. First, the Court shall not have jurisdiction on a matter of boundary in relation to registered land, dispute between parties if no (boundary) has been determined by the relevant office. Second, the Court shall have jurisdiction over a boundary dispute between parties where one has been determined as per the Section. Thus, to determine Ground of Appeal was merited this Court had to carefully analyze the pleadings and prayers therein in comparison with the provision of law above.



18. I have considered the pleadings and the submissions on this point of law. In the Plaint dated 16/09/2019 the Plaintiff averred that sometime in the year 2016 the Defendant started to encroach onto Plot No. 51C. He lodged a complaint with the Ministry of Lands but the Defendant refused to attend when summoned. Then the Defendant started erecting permanent structures on her parcel of land without his permission and common sense. He prayed for the Defendant be restrained. The Defendant on his part filed a Defense dated 24/09/2019. She alleged that the plots 51C and 51 were fully developed and the defendant was only renovating his and creating a small room at the rear part of it which was L-shaped.
19. What is clear from the pleadings is that the two parcels of land were registered as Plots 51C and 51 and recorded and may have been allocated to the two parties or the initial allottees accordingly. Secondly, they are or were not yet surveyed at the time the lower court matter was instituted, and the boundaries were not indicated as having been fixed, as per requirements of the law. When these facts are compared with the provisions of Section 18 of the *Land Registration Act*, it appears to me and this Court finds, that only the Land Registrar in charge of Turkana County, acting in conjunction with the Surveyor in charge of the County was the office or officer clothed with jurisdiction to determine the dispute between the Plaintiff and the Defendant in relation to the two parcels of land, namely, Plot No. 51C and 51, to the extent that the issue regarding the boundary(ies) between them and find out whether or not there was indeed encroachment onto either.
20. The upshot is that the learned trial Magistrate did not have jurisdiction to try the suit. He should have declined it. This Appeal is allowed with costs to the Appellant.
21. This Court therefore sets aside the judgment of the trial Court and strikes out the suit, being Lodwar CMC Land Case No. 3 of 2019. There shall be no order as to costs since the parties are neighbours who should be encouraged to live in harmony. For this reason, this Court shall not take its time to analyze the merits of the case as was at the trial. Further, to enable the parties seek the proper remedy in the appropriate offices, the Respondent(s) are stopped from carrying out any further or other construction on the disputed portion for a period of six (6) months, even as the costs of this Appeal shall be agreed on or taxed, if that occurs within the six (6) months. The parties should refer the matter to the Land Registrar to determine the boundary between them.
22. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM  
THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**HON. DR. IUR F. NYAGAKA**

**JUDGE ELC KITALE**

In the presence of:

Nafula Advocate-----for the Appellant

Cherogoi holding brief for Kenei Advocate-----for the Respondents

