



REPUBLIC OF KENYA



**Simiyu & 2 others v Samita (Environment and Land Appeal 17 of 2016)
[2024] KEELC 13262 (KLR) (18 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13262 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 17 OF 2016
JM ONYANGO, J
NOVEMBER 18, 2024**

BETWEEN

ALEX SIMIYU 1ST APPELLANT

ALFRED WAFULA SIMIYU 2ND APPELLANT

VINCENT NYONGESA 3RD APPELLANT

AND

FRANCIS SIMIYU SAMITA RESPONDENT

JUDGMENT

1. Before me is an appeal against the judgment of the Honourable Nicodemus N. Moseti (RM) in CMCC No. 291 of 2009 dated and delivered on 16th August 2016 which effectively granted prayers to inter alia evict the Appellants from all that parcel of land know as L.R. Kakamega/Moi's Bridge/1063 (hereinafter the suit land).
2. The genesis of this appeal lies in a dispute over the proprietary rights to the suit land. By a plaint dated 28th April 2009, the Respondent staked his claim, asserting that the Appellants were trespassers upon his land and thereby sought orders of eviction along with a permanent injunction to restrain the Appellants from any further interference with the suit land.
3. The Appellants on their part filed a joint Statement of Defence dated 22nd May 2009 in which they categorically denied the Respondent's claim to the suit land, contested his right to evict them and denied the jurisdiction of the trial court.
4. However, during hearing of the main suit in the trial court which commenced on 14th June 2010, and despite being given sufficient time to do so, the Appellants failed to call any witness to controvert the Respondent's case.



5. Prior to the delivery of the judgment, the Appellants filed an application dated 1st March 2016 seeking leave to re-open the defence case. The application was later dismissed on 10th May 2016 for want of prosecution.
6. The Magistrate, in his judgment, observed this conspicuous silence on the part of the Appellants and noted:

“The defence was granted sufficient opportunity to call their witnesses. The defence failed to secure any defence witness and the court ordered the defence case to be closed on 12th January 2016 upon application by the plaintiff.”
7. Upon hearing the Respondent’s case, the Magistrate delivered a judgment allowing the prayers in the Plaint and directed that the Appellants herein vacate the suit land within 60 days from the date of the Judgment. The Appellants filed an application for stay of execution pending appeal which was allowed by a ruling delivered by the Honourable A. Ombwayo J on 28th June 2017.
8. The impugned judgment in CMCC 291 of 2009 set the stage for the appeal before this court anchored on the grounds that the learned Magistrate erred by:
 1. Failing to give proper or any proper attention to the evidence of the Appellants and their witnesses.
 2. Failing to give proper attention to the documentary evidence by the appellants.
 3. Determining a matter in which he had no jurisdiction.
 4. Acting ultra vires, disregarding the stay of proceedings by the High Court in Malindi barring all magistrates’ courts from hearing and determining matters relating to land.
 5. Giving undue weight and credence to evidence of the plaintiff and failing to call the defendant to adduce evidence.
 6. Delivering the judgment on 16th August 2016 without giving the parties notice of the date when the judgment would be delivered in breach of the *Civil Procedure Act*, Rules and normal practice of the court thereby denying an aggrieved party his right of appeal.
 7. Failing to give the Appellant and indeed all the parties any proper and/or adequate opportunity to give evidence and/or written submissions and delivered his judgment without the benefit and input of submissions from the Applicant/ intended Appellant.
 8. Going contrary to the provisions of article 162 of *the Constitution* of Kenya which is the supreme law of the land.
 9. Failing to appreciate that he had not been gazetted to handle land matters
 10. Refusing to recognize a valid letter of consent by the Land Control Board contrary to law.
 11. Deciding the case on critical assumptions not supported by evidence and deciding the case against the weight of evidence produced before him.
 12. Fixing the matter for delivery of judgment yet there was an application in subsistence that had not been heard and determined.
 13. Failing to realize that the trial court did not have jurisdiction to adjudicate over the subject matter of the case



14. Failing to strike out the Respondent’s plaint for want of jurisdiction despite the clear provision of the law on the same
 15. Ignoring the provisions of the law particularly Article 159 of *the Constitution*, Land Court Act, the *Land Act* 2012 and the *Land Registration Act* 2012.
9. The appeal was canvassed by way of written submissions which were duly filed by the Appellants on 20th October 2024.
 10. The appeal is uncontested with the Respondent having failed/neglected to file their written submissions.

Issues for Determination

11. Having given due consideration to the proceedings of the trial court, the Memorandum of Appeal and the Appellants submissions, it is my view that the following issues emerge as pivotal points for determination:
 - i. Whether the trial court had jurisdiction to hear and determine the matter
 - ii. Whether the Appellants were accorded a fair trial

Analysis and Determination

i. Whether the trial court had jurisdiction to hear and determine the matter

12. As a first appellate court, my jurisdiction is to conduct a careful reappraisal of the evidence and issues presented before the trial court, to sift through the record with a discerning eye, and to reach my own considered conclusions. Yet, my role is circumscribed; it is not my place to embark upon fresh inquiries, venture beyond the record or to entertain matters that were neither raised nor contemplated in the trial court.
13. To do otherwise would be to stray beyond my remit, undermine the integrity of the appellate process and trespass into territory that rightly belongs to the trial court’s own function. See the Court of Appeal’s decision in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR where the court reiterated its mandate as espoused in *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212 where it stated:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
14. Thus, the court’s role is not to chart a new course but rather to ensure that justice, as derived from the record, has been duly administered. I will abide by this principle as I determine the key issues in this appeal and refrain from addressing new issues raised by the Appellant.
15. Firstly, jurisdiction, as the very lifeblood of a court’s authority, is foundational; without it, the court’s actions are rendered void, mere shadows of justice. It is a gate through which every suit must first pass, for no matter how compelling a case may be, a court lacking jurisdiction cannot hear it. In the absence of jurisdiction, the court’s actions are, as it were, steps into a void, for jurisdiction defines the very limits within which justice operates.



16. The significance of jurisdiction was aptly espoused in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd. (1989) where the court stated:

“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...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

17. Several grounds (see grounds: 3,4,8,9,13,14) in the instant appeal fault the trial court in CMCC No. 291 of 2009 for failing to address the issue of jurisdiction raised by the Appellants herein. The Appellant’s contention is that the trial court lacked jurisdiction to determine land disputes and erred in proceeding with the suit.
18. I take judicial notice of the various decisions that impacted the jurisdiction of magistrates’ courts as it relates to handling land disputes. See the decisions in Malindi Law Society v Attorney General & 4 others [2016] eKLR; Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others [2017] eKLR; Republic v Chengo & 2 others (Petition 5 of 2015) [2017] KESC 15 (KLR) (26 May 2017) (Judgment).
19. On 11th November 2016, the High Court of Kenya at Malindi rendered a decision which inter alia barred subordinate courts from exercising jurisdiction over any matters relating to land. I however take note that the decision in Malindi Law Society v Attorney General & 4 others (Supra) was delivered 3 months after the judgment in CMCC No. 291 of 2009.
20. Therefore, although the assertion that the subordinate courts lacked jurisdiction to handle land disputes rang true for a while, the position was overturned by the Court of Appeal in Law Society of Kenya Nairobi Branch v Malindi Law Society & 6 others (Supra). Accordingly, the position is not applicable in the instant case as alleged by the Appellants.
21. The court delivered its judgment on 16th August 2016 well before any restrictions on handling land disputes were placed on subordinate courts.
22. The upshot of the foregoing is that the grounds challenging the jurisdiction of the trial court must inevitably fail.

ii. Whether the Appellants were accorded a fair hearing

23. The Appellants contend that the trial court constrained their right to a fair hearing. They argue that the learned magistrate accorded undue weight to the plaintiff’s evidence, yet failed to invite the defendants to adduce their own.
24. Furthermore, they claim the trial court denied them the chance to file their written submissions before judgment was rendered. Additionally, they fault the magistrate for setting a date for judgment despite the existence of a pending application, thereby depriving them of the full measure of procedural fairness.
25. *The Constitution* of Kenya, 2010, enshrines the right to a fair hearing as a sacrosanct right, protected under Article 50 which states:

“ 50.



- (1) Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

26. In *Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & Another* [2018] eKLR, the Court illuminated the principles of fair trial in civil cases under Article 50, stating as follows:

“While the wording of Article 50 of *the Constitution* on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a Court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time.

...The doctrine of fairness of the procedure ultimately shall as the case may be the precise architect implied under Order 3, 7 and 11 of the Civil Procedure rules.”

27. The Court further observed that:

“... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.”

28. Essentially, it is no mere procedural formality, but a fundamental freedom woven into the very fabric of our legal system, embodying the principles of justice and equality. The right to a fair hearing is thus constitutionally safeguarded, standing as a bulwark against any semblance of unfairness in judicial proceedings.

29. In my understanding, the right to be heard in civil trials encompasses, for the Defendant, a series of fundamental entitlements. These include the right to receive notice of the suit’s existence and the specified dates for court attendance; the liberty to file responses to the Plaintiff’s claims; and the unequivocal entitlement to be present and fully participate in the proceedings.

30. The court record indicates that the Appellants were served with a Summons to enter appearance dated 6th May 2009 notifying them of the suit. In response, the Appellants filed a Memorandum of Appearance dated 22nd May 2009 and filed on 25th May 2009 together with a joint Statement of Defence of even date.

31. The hearing of the suit in the trial court commenced on 14th June 2010 and the Plaintiff closed their case on 14th August 2012.

32. A perusal of the record indicates that the Defense hearing was set to commence on 15th January 2013. However, due to a plethora of reasons, the defence hearing was adjourned until 12th January 2016. On that date the trial court directed the parties that the hearing was to proceed as the hearing date was taken by consent of both counsel on record.

33. Regrettably, neither the Appellants nor their learned counsel appeared for the hearing or provided any explanation for their absence in court. Consequently, the trial court was compelled to close the Appellants’ case.



34. On 1st March 2016, the Appellants filed an application seeking to re-open the defendants' case. The trial court certified the application as urgent and the same was set for inter partes hearing on 29th March 2016 and later set for hearing on 10th May 2016.
35. Unfortunately, counsel for the Appellants failed to appear for the hearing of the application and the same was dismissed for want of prosecution on 10th May 2016. The court additionally directed the parties to file their written submissions. On 31st May 2016, the Respondent confirmed having filed their submissions and the Appellants were accorded 2 weeks to file their submissions prior to the delivery of judgment.
36. Under Order 12 Rule 2 and Order 17 Rule 3 of the Civil Procedure Rules, 2010, the court is vested with the authority to proceed ex parte when the Defendant, despite receiving sufficient notice of the hearing date, fails to appear.
37. The *Civil Procedure Act*, in its Section 1A, enshrines the overriding objective of these Rules to ensure the just, expeditious, proportionate, and cost-effective resolution of civil disputes. To repeatedly defer the hearing in the manner in which the Appellants did would frustrate this objective, leaving the wheels of justice needlessly stalled. In proceeding as it did, the court upheld its mandate to administer justice without undue delay.
38. The Appellant cannot rightly be cast as a party deprived of their right to be heard. In every material respect, the trial court acted with fairness and latitude toward the Appellants, affording them multiple opportunities to present their case. They were duly notified of the proceedings at each stage and even granted a chance to argue an application to reopen their case—a chance they ultimately failed to seize. The Appellants' assertion of an unfair hearing is thus without foundation, and I find myself bound to reject this claim.
39. In the end, this appeal stands barren of any merit, and justice demands its dismissal. Upon careful consideration of the arguments and the evidence presented, it is evident that the Appellants' claims cannot withstand the scrutiny of law or equity.
40. Accordingly, the appeal is dismissed in its entirety, and the orders of the trial court are upheld as just and proper in the circumstances. Since the Respondents did not participate in the appeal I make no orders as to costs.

DATED, SIGNED AND DELIVERED, AT ELDORET THIS 18TH DAY OF NOVEMBER, 2024

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J. M. ONYANGO

JUDGE

In the presence of;

1. Alfred Wafula Simiyu 2nd Appellant
2. No appearance for the Respondent

Court Assistant: Brian

