



**Mwai v Tiras & 4 others (Environment and Land Appeal 23 of 2020)
[2023] KEELC 523 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 523 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 23 OF 2020
EK WABWOTO, J
JANUARY 26, 2023**

BETWEEN

ANGELA NJERI MWAI APPELLANT

AND

SAMUEL WAINAINA TIRAS 1ST RESPONDENT

NAIROBI CITY COUNCIL 2ND RESPONDENT

COUNCILLOR KAMAU NYUTU ALIAS MOHAMED 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

JUDGMENT

1. This is an appeal against the Judgment and orders of the Chief Magistrate's Court at Nairobi dated and delivered on the 29th day of May 2020 by honourable Mrs LL Gicheha (CM) in Nairobi Civil Case No 1594 of 2002 in which the learned magistrate entered judgment in favour of the 1st respondent and granted the following orders;
 - i. A permanent injunction be and is hereby issued restraining the defendants by themselves, their servants and or agents from interfering, constructing, selling, alienating, transferring disposing charging or in any other manner dealing with Plot No 14 known as Nairobi/Block 63/584.
 - ii. A declaration is hereby made that the 1st and 3rd defendants are trespassers on Plot No 14 known as Nairobi/Block 63/584.
 - iii. A declaration is hereby made that Plot No 14 known as Nairobi/Block 63/584 belongs to the plaintiff.



- iv. An order is hereby issued directing the 1st defendant to surrender the original lease between herself and the 2nd defendant to the 4th and 5th defendants for cancellation and rectification of the records to reflect the plaintiff as the lease.
 - v. Costs of the suit to be borne by the 1st, 2nd and 3rd defendants.
 2. The appellant being dissatisfied with the outcome filed this appeal through memorandum of appeal dated June 29, 2020. The following are the grounds of appeal as listed on the face of the memorandum of appeal: -
 1. That the learned Magistrate erred in law and fact in failing to appreciate the provisions of article 50 of the Constitution on “fair hearing” by failing to accord the appellant an opportunity to present her testimony before court.
 2. That the learned Magistrate erred in law and in fact in failing to take into account that the appellant had not been subjected to a fair hearing process with due regard to the rules of natural justice, procedural fairness and the relevant provisions of the Constitution.
 3. That the learned Magistrate misdirected herself in law by failing to appreciate that by granting a permanent injunction against the defendants without hearing the testimony of the appellant is denial of a fundamental right of fair hearing which is enshrined in the Constitution.
 4. That the learned trial Magistrate erred in fact and in law by failing to consider the appellant had not yet closed her case.
 5. That the learned trial Magistrate erred in law by making a determination that the respondent/plaintiff’s case was uncontroverted whereas the appellant had duly filed a defence with triable issues but was not granted audience by the court to call her witnesses and produce her documents.
 6. That the learned trial Magistrate erred in fact and in law by making a determination that the appellant did not produce her counterclaim whereas the appellant was not granted audience by the court to call her witness and produce her documents in support of the counterclaim.
 7. That the learned trial magistrate erred in fact and in law by determining a matter which had been instituted and conducted before a court that lacked jurisdiction.
 8. That the learned trial Magistrate erred in fact and in law by determining a matter based on proceedings that were null and void.
 9. That the judgment was prematurely delivered since the defence cases had not been closed.
 3. On the basis of those grounds, the appellant sought the following orders: -
 - a. This appeal be allowed.
 - b. The judgement of the Chief Magistrate Court dated May 29, 2020 be varied or set aside.



- c. This honourable court awards the appellant the costs of this appeal and costs of the proceedings before the trial court.
4. The appeal was canvassed through written submissions. The appellant relied on their written submissions dated October 21, 2021 which were filed by Kiragu Wathuta & Company Advocates. Counsel outlined three issues for determination by this court while canvassing their appeal. The outlined issues were as follows: -
 - a. Whether the appellant had closed her case and whether she was accorded an opportunity to present her testimony?
 - b. Whether the court before which the suit was filed had the requisite jurisdiction to hear and determine the case and whether the suit was a nullity.
 - c. Whether the 1st respondent was entitled to the reliefs sought in the trial court.
5. On the issue of trial court having jurisdiction, counsel submitted that the appellant had raised the issues of jurisdiction as was seen at page 81-96 of the record and on page 273 the court rendered a ruling stating:-

“...the court does not have jurisdiction. The parties make application to have the matter transferred to the Land and Environmental Court...”
6. It was submitted that later the trial court on November 22, 2018, purported to render another ruling stating as follows:-

“... the application on jurisdiction is dismissed with no orders as to costs...”
7. Reliance was made to the cases of *Phoenix EA Assurance Company Limited Vs SM Thiga t/a Newspaper Service* [2019] eKLR, *Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd* 1989.
8. It was argued that the subject property Nairobi/block 63/584 was registered under the *Registered Land Act* cap 300 (Repealed) and since the 1st respondent’s case was filed in 2002 before the promulgation of the *Constitution* of Kenya 2010, the said Act was operational and set the pecuniary jurisdiction of Magistrates Court at Ksh 500,000/-
9. The appellant contended that the trial court did not have the requisite jurisdiction to hear and determine the matter from the get go considering the value in 2001 was Ksh 800,000/- the case of *Tabitha Wambui Munyao & 7 Others Vs Peter Ngugi Kainamia & Another* [2015] eKLR was cited in support of this position.
10. On whether the appellant was granted an opportunity to be heard before the trial court, it was submitted that the proceedings of December 5, 2018 showed that the application for an adjournment by counsel for the appellant was declined by the trial court and thus the trial court closed the appellant’s case without hearing them.
11. It was further submitted that in view of the foregoing, the 1st respondent ought not to have been granted the reliefs *vide* her plaint. The appellant concluded her submissions by praying that the appeal be allowed with costs.



12. The 1st respondent opposed the appeal *vide* the written submissions dated November 18, 2022 through Wanjiru Theuri and Company Advocates. Counsel outlined three issues for determination by the court. This included the following: -
 - a. Whether the honourable court had jurisdiction to hear and determine the suit placed before it by the 1st respondent (plaintiff then).
 - b. Whether the appellant was accorded a fair hearing.
 - c. Whether the 1st respondent was entitled to the relief sought in the trial court.
13. Counsel argued that in the pleadings filed before the trial court, the appellant had admitted and submitted to the jurisdiction of the trial court and that parties are bound by their pleadings and the uncertainty as to whether the subordinate courts had jurisdiction to deal with land matters was settled by Gazette Notice No 5178. The cases of *Malawi Railways Ltd vs Nyasulu* [1998] MWSC 3 and *Sironga Ole Tukai vs Francis Arap Muge & 2 Others* Civil Appeal No 76 of 2014 eKLR and *National Housing Corporation vs Chief Magistrate Court, Mombasa & 2 Others* [2012] eKLR were cited in support.
14. On whether the appellant was accorded an opportunity to be heard, it was submitted that the suit was instituted by the 1st respondent in March 2002 then the appellant upon being served filed a defence and counterclaim dated October 3, 2002. It was also sated that the matter came up for hearing several times but it did not proceed until December 5, 2016 when the appellant's Counsel's application for adjournment was not granted and the appellant's case was closed by the trial court. The appellant had not filed witness statements and or other documents to be produced during the hearing. The cases of *Okaka & Another vs Wesonga* (Civil Appeal E003 of 2022 [2022] KEHC 9804 (KLR) (30 June 2022) (Judgment) and *Japheth Pasi Kilonga & 8 Others vs Mombasa Autocare Limited* [2015] eKLR were cited in support.
15. Clause 7.4.4 of the sale agreement dated July 2, 2018 is clear on what specific matters would be referred to arbitration and that the subject matter of this dispute being access to DSTV connection, was not provided for under the subject agreement for sale. Counsel made reference to the cases of *Kenya Tea Development Agency Ltd Vs Savings Tea Brokers Limited* (2015) eKLR and *Mary Waitthera Gikima & Another Vs Kariuki Wairagu & 3 others* (2019) eKLR in support of the said position.
16. On the orders that were issued by the trial Court, it was submitted that the 1st respondent established that he was genuinely allocated the suit property which he has since developed and further that he had established a case warranting the grant of the order sought. Counsel urged the court to dismiss the appeal and with costs.
17. I have considered the entire record of the trial court, I have also considered the parties respective submissions in this appeal.
18. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal as set out in the case of *China Zbingxing Construction Company Ltd vs Ann Akuru Sophia* [2020] eKLR.
19. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion.
20. In my humble view, the following issues stand out as key issues for determination which can dispose the appeal. These are: -
 - i. Whether the trial court had jurisdiction to hear the suit?



- ii. Whether the appellant was accorded a fair hearing?
 - iii. Whether the trial court erred in granting the orders sought?
21. I will proceed to analyze the said issues sequentially.
22. In the case of the *Owners of Motor Vessel “Lillian S” vs 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.”
23. 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*.”
24. 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. [Emphasis supplied]

25. 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 March 1, 2016, Gazette Notice No 1475 dated March 14, 2016, Gazette Notice No 11930 dated December 5, 2017 and Gazette Notice No 2575 dated February 28, 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 January 2, 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. [Emphasis supplied]

26. 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 and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of and title to land.

27. Flowing from the above analysis, the appellant's contention that the trial court had no jurisdiction to hear the suit is misplaced.

28. On whether the appellant was accorded an opportunity to be heard, article 50 of the Constitution of Kenya 2010 entrenches the right to fair hearing to wit;

“Every person has the 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.”

29. In the case of *Prime Salt Works Ltd v Kenya Industrial Plastics Ltd* (2000) LLR 986 the Court of Appeal of Kenya held that: “The implicit in the concept of fair adjudication lie two cardinal principles, namely that no man shall be judge in his own case and that no man shall be condemned unheard. These



two principles, the rules of natural justice, must be observed by courts save where their application is excluded or by necessary implication.”

30. The appellant submitted that the trial court erred in not granting her an opportunity to be heard. However, upon perusal of the record, this court finds that when the matter came up for hearing on December 5, 2018 the appellant’ counsel applied for an adjournment which was declined and the court directed the matter to proceed at 10.30 am. Later at 10.30 am the appellant’s witness was not in court and the court closed the appellant’s case directing parties to file and exchange written submissions. In view of the foregoing, it is the finding of this court, that the trial magistrate cannot be faulted for declining the adjournment sought by the appellant and closing their case. This ground of appeal cannot stand.
31. Having found that the trial court had jurisdiction to hear the 1st respondent’s case and further that the appellant was accorded an opportunity to be heard, it is the finding of this court, that the 1st respondent was entitled to the reliefs sought which were issued pursuant to the judgment delivered by the learned magistrate on May 29, 2020 and it is therefore not open for this court to interfere with the same.
32. 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. Nevertheless, costs do follow the event unless there is good clause to deprive the successful party of such costs. I do not see any reason to depart from the same. In respect to the subject matter, the order that commands itself to me to grant is that the appellant shall bear the costs of this appeal.

Final orders

33. The upshot is that after careful review and analysis of all the grounds of appeal and the entire record, I am satisfied that the learned Magistrate addressed herself properly on the law and considered all relevant factors in arriving at her decision. Having addressed all the issues that were synchronized herein above, I now conclude as hereunder: -
 - i. The appeal is devoid of merit and is dismissed.
 - ii. Costs of this appeal are awarded to the 1st respondent.

34 Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

E. K. WABWOTO

JUDGE

Ms. Nduta h/b for Mr. Kiragu for the appellant.

N/A for the 1st Respondent.

N/A for the 2nd Respondent.

N/A for the 3rd Respondent.

N/A for the 4th Respondent.

N/A for the 5th Respondent.

Court Assistants: Caroline Nafuna and Philomena Mwangi.

