



REPUBLIC OF KENYA



**Mwangi v Kimeu & another (Civil Appeal 18 of 2012)
[2024] KEHC 1959 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1959 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 18 OF 2012

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

PAUL MWAURA MWANGI APPELLANT

AND

FRANCIS MUAMBA KIMEU 1ST RESPONDENT

JOSHUA SINDIGA 2ND RESPONDENT

*(Being an appeal against the ruling and order of M.K. Kiema, RM
delivered on 10th January, 2012 in Milimani CMCC No. 5333 of 2011)*

JUDGMENT

1. This appeal emanates from the ruling delivered on 10th January, 2012 in Milimani CMCC No. 5333 of 2011. The background facts are that Francis Muamba Kimeu (hereafter the 1st Respondent) lodged the suit by way of the plaint dated 4th November, 2011 and amended on 29th November, 2011 seeking injunctive and declaratory orders against Paul Mwaura Mwangi (hereafter the Appellant) and Joshua Sindiga (hereafter the 2nd Respondent) in respect of the parcel of land known as Plot LR. No. 22143/113 (the subject property) allegedly belonging to the 1st Respondent.
2. The plaint was accompanied by the Notice of Motion dated 4th November, 2011 (the first application) wherein the 1st Respondent sought inter alia, a temporary injunctive order against the Appellant and the 2nd Respondent, restraining them from interfering with, trespassing on or in any other manner dealing with the subject property pending the hearing and determination of the suit. The 1st Respondent further sought a mandatory injunction compelling the 2nd Respondent to remove all illegal structures erected on the subject property, and additionally, an order compelling the OCS Kayole Police Station and the D.C. Kayole District to assist in enforcing the aforementioned orders.



3. The first application was anchored by the grounds on its face and the facts stated in the affidavit of the 1st Respondent, averring that at all material times he was the proprietor of the subject property, upon purchasing it from Leltayet Court Developers (the Developers) vide the agreement dated 1st March, 2005. The 1st Respondent averred that sometime in the month of September, 2011 the Appellant had without any colour of right unlawfully leased the said property to the 2nd Respondent.
4. The 1st Respondent further averred that the 2nd Respondent soon thereafter committed acts of trespass on the subject property involving erection of structures thereon. That attempts to resolve the issue amicably through the Chief-Kayole Area, were futile and that unless the injunctive orders sought were granted, he stood to suffer irreparable loss.
5. Subsequently, the Appellant and the 2nd Respondent filed the Notice of Motion dated 16th November, 2011 (the second application) seeking the dismissal of the first application, with costs. The grounds on the face of the application were amplified in the supporting affidavits of the Appellant as well as the 2nd Respondent. On his part, the Appellant stated that he was a stranger to the subject property and hence the prayer sought could not apply to him. The Appellant further stated that the 1st Respondent had no locus standi in the matter and had not met the threshold for a grant of the orders sought in the first application. It was his averment that his late father, Ryboy Mwangi (the deceased), had previously purchased the parcels of land known as Plot LR. No.s 22143/117 and 22143/120 (the second and third properties) from the Developers in the year 1999 and hence the orders are wrongly sought against them. His sentiments were echoed in the supporting affidavit sworn by the 2nd Respondent.
6. The 1st Respondent resisted the second application by swearing a replying affidavit on 29th November, 2011 deposing inter alia, that the Appellant and the 2nd Respondent did not annex a map indicating the exact locations of the second and third properties. He restated his earlier averments that the Appellant had illegally leased the subject property to the 2nd Respondent, who then encroached thereon and unlawfully erected structures. That the Appellant was under the mistaken belief that the subject property rather than the second property belonged to him by virtue of his late father's acquisition. He sought that the second application be dismissed and the first application allowed.
7. The two (2) applications were heard together and upon close of submissions, the trial court by way of the ruling delivered on 10th January, 2012 allowed the first application as prayed, thus provoking the instant appeal which was based on the following grounds:
 - “ 1. The Learned trial Magistrate erred in law and fact in failing to find that the 1st Respondent's Notice of Motion dated 4th November, 2011 which sought both prohibitory and mandatory injunctions against the Appellant was grounded on a suit in which the Appellant had been improperly joined as a defendant as there was evidence before the court that the land in dispute was owned by one Ryboy Mwangi who was deceased and the proper defendant to the suit could only be the legal representative of the estate of the said Ryboy Mwangi. Had the Trial magistrate properly applied his mind to these facts and the law he would have dismissed the application for injunction.
 2. The learned trial Magistrate erred in law in proceeding to hear a dispute affecting land in which the estate of Ryboy Mwangi had an interest yet the legal representative of the deceased's estate had not been made a party to the suit with the result that he gave orders affecting the rights of a party who was not heard on the matter.



3. The learned trial Magistrate erred in law and fact in entertaining the suit and the application for injunction in a matter concerning land registered under the provisions of the Registration of Titles Act, Cap. 281 and in which the court lacked jurisdiction.
4. The Learned trial Magistrate erred in law and fact in granting both prohibitory and mandatory injunctions where there was no sufficient evidence before him to prove, on a balance of probability, that the land leased to the 2nd Respondent by the estate of Ryboy Mwangi was LR No. 22143/113 as contended by the 1st Respondent and NOT LR No. 22143/117 or 22143/120 as contended by the Appellant.
5. The learned trial Magistrate erred in law and fact in dismissing the Appellant's application dated 16th November, 2011 even after evidence had been placed before the court by way of affidavits showing that the 1st Respondent had not only concealed material facts when he moved the court for the ex-parte orders granted on 7th November, 2011 but had also failed to serve the order, the application dated 4th November, 2011 and the plaint within the time stipulated under the rules.
6. The learned trial Magistrate completely misapprehended the case and the evidence before him and came to a wrong conclusion when he allowed the 1st Respondent's Notice of Motion dated 4th November, 2011 and dismissed the Appellant's Notice of Motion dated 16th November, 2011." (sic)
8. Directions were given for the appeal to be canvassed by way of written submissions. The Appellant's counsel on his part while citing the provisions of Order 1, Rule 10; Order 8, Rule 5; Order 24, Rule 5 and Order 25, Rule 5 of the *Civil Procedure Rules* (CPR) submitted that the trial court ought to have addressed its mind to the issue of improper joinder of the Appellant and the 2nd Respondents as defendants in the suit, and therefore ought not to have issued the injunctive orders sought in the first motion.
9. The Appellant's counsel further faulted the trial court for entertaining the first application without the requisite jurisdiction, by dint of Sections 2 and 9A (1) (c) of the *Magistrates' Courts Act* Cap. 10 Laws of Kenya. That the proper court to which the suit and application ought to have been filed is the Environment and Land Court (ELC). It was counsel's argument that the trial court erred by granting the first application when the 1st Respondent had not established a prima facie case, in the absence of any credible evidence to show an infringement of his rights in respect of the suit property. That the parcels of land referenced in the first application are distinct from those purchased by the deceased. For those reasons, the court was urged to allow the appeal as prayed.
10. On behalf of the 1st Respondent, his counsel whilst supporting the trial court's decision, anchored his submissions on the decision rendered in *William Kiprono Towett & 1597 Others v Farmland Aviation Ltd & 2 Others* [2016] eKLR and the proviso of Order 1, Rule 9 of the *CPR* to argue that no suit shall be defeated simply on grounds of non-joinder or misjoinder of parties. Counsel argued that the Appellant and the 2nd Respondent were proper parties to the suit by virtue of the fact that the former leased the subject property to the latter, who then illegally undertook construction thereon.
11. Counsel for the 1st Respondent cited the decisions in *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and *Mrao v First American Bank of Kenya Ltd & 2 others* CA No 39 of 2002 [2003] eKLR on



the applicable test in determining applications for temporary injunction. Counsel asserting that the 1st Respondent established a prima facie case, given that his ownership and right to possession of the suit property was not put to question, and that the 2nd Respondent had committed an act of trespass on the suit property, on the purported authority of the Appellant.

12. In conclusion, counsel relying on Court of Appeal decision in [Said Ahmed v Manasseh Denga & Another](#) [2019] eKLR supported the decision of the trial court and therefore urged that the appeal be dismissed with costs.
13. The court has perused the original record, the record of appeal and considered the material canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Kenya Ports Authority v Kusthon (Kenya) Limited* (2000) 2EA 212, *Peters v Sunday Post Ltd* (1958) EA 424; *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123; *William Diamonds Ltd v Brown* [1970] EA 11 and [Ephantus Mwangi and Another v Duncan Mwangi Wambugu](#) (1982) – 88) 1 KAR 278.
14. The Court of Appeal stated in [Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates](#) [2013] eKLR that:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
15. In the court’s considered view, this appeal turns on the question of jurisdiction. From a review of the pleadings and material forming part of the record of appeal, it is apparent that the claim against the Appellant and the 2nd Respondent is based on alleged trespass on the suit property, by the 2nd Respondent, with the purported authority of the Appellant, who allegedly illegally leased to the 2nd Respondent, the suit property, claimed by the 1st Respondent as his property.
16. Having perused the record of the lower court, the court did not find any indication that the jurisdiction of the trial court was challenged at all. Although it is trite that no new issues can be raised on appeal, the question of jurisdiction constitutes a fundamental issue of law which cannot be disregarded.
17. The legal principle being that jurisdiction is everything and that without it, a court cannot perform any further action in a matter. This position was reaffirmed by the Court of Appeal in [Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service](#) [2019] eKLR when it held thus:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction. In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989):

“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.”

These words were echoed by this Court in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR in the following words: -

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.” (Emphasis ours)

Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v. David Mwangi Gichure & Another* (2013) eKLR is however on all fours and addresses the issue raised by Ms. Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The Court succinctly settled this point in the following words: -

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v. Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

18. As earlier noted, the Appellant on this appeal challenged the jurisdiction of the trial court in determining the first application and by extension, the suit. This argument was supported by the averment that the properties in question, namely the suit property, second and third properties, were registered under the now repealed Registration of Titles Act and that that by dint of Sections 2 and 9A (1) (c) of the *Magistrates’ Courts Act* Cap. 10 and the Environment and *Land Act*, the magistrates’ courts lacked jurisdiction to handle disputes pertaining to land and the environment. The 1st Respondent did not address this issue in submissions.
19. The 1st Respondent’s suit and application were filed before the commencement of the new Magistrates’ Court Act in 2016 which repealed the Magistrates’ Court Act (Cap 10). The latter had been in force since 1967 and provided for the jurisdiction of the Magistrates’ Court in civil matters. The civil pecuniary jurisdiction of the Resident Magistrate’s court was limited to subject matter whose



value did not exceed Kshs.2 million. However, Part IIIA of the Act which provided for jurisdiction of subordinate Courts in certain cases relating to land was repealed in 1990.

20. Moreover, the *Environment and Land Court Act* which commenced in August 2011 vested the jurisdiction to hear disputes relating inter alia to the use and occupation of, and title to land to the Environment and Land Court (ELC), established as a superior court of record with the status of the High Court.
21. Here, it appears likely, despite the absence of title copies on record that, given the references and type of interest indicated in the respective parties' sale agreements, the disputed properties were registered under the repealed Registration of Titles Act. Section 2 of the *Registration of Titles Act* defined "court" as the High Court. The Act was repealed by the *Land Registration Act* that commenced in May 2012. It is a matter of public record that the first cohort of ELC Judges were appointed in that year. Hence nothing prevented the 1st Respondent from approaching the High Court in November 2011 when he filed his suit.
22. Considering the foregoing, the Court agrees with the Appellant's position that the learned Resident Magistrate who handled the dispute between the parties from November 2011 until January 2012 lacked the necessary jurisdiction to entertain the matter. Proceedings taken without jurisdiction are a nullity, and on that basis the appeal is allowed. The proceedings and ruling of the lower court are hereby set aside. The court substitutes therefor an order striking out the suit in the lower court in its entirety. The costs of the appeal are granted to the Appellant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: N/A

For the 1st Respondent: N/A

For the 2nd Respondent: N/A

C/A: Carol

