



**Odindo v Awouche & another (Civil Appeal E451 of 2021)
[2024] KEHC 4904 (KLR) (Civ) (26 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4904 (KLR)

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

CIVIL

CIVIL APPEAL E451 OF 2021

WM MUSYOKA, J

APRIL 26, 2024

BETWEEN

AGNES AYO O ODINDO APPELLANT

AND

BARACK AWOUCHE 1ST RESPONDENT

NAIROBI CITY COUNCIL 2ND RESPONDENT

(Appeal from orders made in the ruling of Hon. AN Ogonda, Resident Magistrate, RM, in Nairobi CMCCC No. E631 of 2021, of 16th July 2021)

JUDGMENT

1. The 1st respondent sued the appellant and the 2nd respondent, seeking a declaration that he was entitled to a certain house within Jericho Estate, Nairobi, as a tenant of the 2nd respondent; an order directing the 2nd respondent to transfer a rent card in respect of the said house to him; and an order of permanent injunction to restrain the appellant and the 2nd respondent from evicting him from the said house. His case was that the previous tenant of that house was his father, who was an employee of the 2nd respondent, and that, upon his retirement, the 1st respondent had taken over the role of paying rent. The father then died, upon which the 1st respondent, he argued, became entitled to take over as tenant.
2. The 2nd respondent filed a defence, dated 20th May 2021, wherein it denied the allegations made against it, and also denied that the appellant was its tenant.
3. The plaint was filed simultaneously with a Motion, dated 27th April 2021, seeking orders to restrain the appellant and the 2nd respondent from interfering with or disrupting the 1st respondent's peaceful possession or occupation of the said house, and to be allowed to continue paying rent, pending hearing



and determination of the application and the suit. The grounds and facts, upon which the said Motion was premised, mirrored and replicated the facts set out in the plaint.

4. That application was placed before the trial court, under certificate of urgency, on 28th April 2021, and temporary orders were granted pending hearing of the application. The appellant also filed a replying affidavit, wherein she asserted that she was the tenant in the house the subject of the suit, and that the 1st respondent was not a son of the previous tenant as alleged. She asserted that she was the person entitled to that house as of right.
5. Grounds of opposition were filed by the appellant, dated 10th May 2021. The issues raised were that no process had been served on the appellant; the court had no jurisdiction to grant injunctive and interlocutory orders under sections 1A and 1B of the *Civil Procedure Act*, Cap 21, Laws of Kenya, and order 51 of the *Civil Procedure Rules*; the 1st respondent had not approached the court with clean hands; the appellant could not be enjoined from property which was within the jurisdiction of the 2nd respondent, to which she was entitled to under the law of succession; the 1st respondent had not given undertakings as to damages; the case had no probability of success; the case did not meet the threshold in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 (Spry, VP); the 1st respondent had been guilty of nondisclosure; the court lacked the requisite pecuniary jurisdiction of Kshs. 20,000,000.00; and no demand before action had been made.
6. The 1st respondent filed a supplementary affidavit, sworn on 18th May 2021, to react to the issues raised by the appellant in her grounds of opposition.
7. The 2nd respondent filed grounds in support of the Motion, dated 20th May 2021. It conceded that the father of the 1st respondent had been its tenant, and that it had been having discussions with the 2nd respondent with regard to transferring the rent card to him. The 2nd respondent averred that it was unaware of any transfer of the tenancy to the appellant, and dismissed any such transfer as illegal. It further denied the authenticity of any rent card held by her.
8. The Motion was canvassed by way of written submissions. In the end, the trial court granted the injunction sought, to restrain interference with or disruption of the 1st respondent's peaceful possession of the house in question. That ruling was delivered on 16th July 2021.
9. The appellant was aggrieved by the orders made in that ruling, and brought the instant appeal, raising several grounds, including lack of jurisdiction of the trial court; the threshold for grant of injunctive relief not being reached; that the property in question belonged to the 2nd respondent; the 1st respondent had not acquired a good title to that property; among others.
10. Directions were given, for disposal of the appeal by way of written submissions. The only submissions that I have seen in the record before me are by the appellant, dated 8th December 2023. I have read through them, and I have understood the arguments made.
11. The dispute before the trial court, for it is still pending, is over occupation of a residential house. A house stands on land. As a fixture on the land, it is part of the land. From the pleadings, it is clear that the said property belongs to the 2nd respondent, the appellant and the 1st respondent claim to be entitled to tenancy of that property. Tenancy is about occupation of property. The fight between the appellant



and the 1st respondent is, therefore, over who is entitled to occupation of that property. *Black's Law Dictionary*, Tenth Edition, Thomas Reuters, 2014, defines land as follows:

“An immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and everything growing on or permanently affixed to it.”

12. Jurisdiction is at the core of exercise of authority by a court, and where jurisdiction lacks, the court downs its tools. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR (Nyarangi, Masime & Kwach, JJA), In the Matter of Interim Independent Electoral Commission [2011] eKLR (Mutunga CJ, Baraza DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Ndung'u, SCJJ) and *Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others* [2012] eKLR (Mutunga CJ, Tunoi, Ojwang, Wanjala & Ndung'u, SCJJ). Under Articles 162(2) and 165(5) of the *Constitution*, the High Court has no jurisdiction to determine disputes that relate to occupation of land. That jurisdiction has been vested exclusively on the Environment and Land Court, and the enabled or empowered subordinate courts, by the *Constitution*; the *Environment and Land Court Act*, Cap 8D, Laws of Kenya; the *Land Act*, Cap 280, Laws of Kenya; and the *Land Registration Act*, Cap 300, Laws of Kenya. If the *Constitution* has declared that the High Court has no jurisdiction over that issue, I cannot venture to entertain an appeal from a decision of an enabled subordinate court, in relation to orders made in a suit before it, turning on the right to occupy land or property. I can only down my tools in that respect.

13. For avoidance of doubt, Articles 162(2) and 165(5) of the *Constitution* state as follows:

“162(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

a. ...

b. the environment and the use and occupation of, and title to, land.”

“165(5) The High Court shall not have jurisdiction in respect of matters -

a. ...

b. falling within the jurisdiction of the courts contemplated in Article 162(2).”

14. Consequently, I am unable to determine the appeal herein. The same is incompetent, for it was filed in a court bereft of jurisdiction, and I hereby strike the same out. I shall not award costs. It is so ordered.

DELIVERED DATED AND SIGNED AT BUSIA THIS 26TH DAY OF APRIL 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Kinyanjui, instructed by J. Harrison Kinyanjui & Company, Advocates for the appellant.

Ms. Soi, instructed by Okumu Kubai & Company, Advocates for the 1st respondent.

