



REPUBLIC OF KENYA



**Kioko v Muchendu t/a Icon Auctioneers & 2 others (Civil Appeal
E543 of 2021) [2024] KEHC 14986 (KLR) (Civ) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14986 (KLR)

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

**CIVIL
CIVIL APPEAL E543 OF 2021**

TW OUYA, J

NOVEMBER 28, 2024

BETWEEN

ROBERT KIOKO APPELLANT

AND

**JEREMIAH KIARIE MUCHENDU T/A ICON AUCTIONEERS 1ST
RESPONDENT**

BLACKSTONE PROPERTIES LIMITED 2ND RESPONDENT

CM ADVOCATES LLP 3RD RESPONDENT

*(Being an appeal against the Ruling of the Hon. D.M. Kivuti (PM) delivered on 8th
September, 2021 in Nairobi Milimani CMCC Misc. Application No. E986 OF 2021)*

RULING

Background

1. This appeal emanates from the ruling delivered on 08.09.2021 by the lower Court in Nairobi Milimani CMCC Misc. Application No. E986 OF 2021 (hereinafter the lower Court suit). Jeremiah Kiarie Muchendu t/a Icon Auctioneers the Applicant before the lower Court, (hereinafter the 1st Respondent) initiated proceedings by way of Miscellaneous Civil Application dated 05.07.2021 expressed to be brought pursuant to Section 152E(1),(2)a-d & 152G(1)a-l of the Land Act & Rule 9(1) & (2) of the Auctioneers Rules as against, Robert Kioko the lessee before the lower, (hereinafter the Appellant), seeking among other orders that the Officer Commanding Karen Police Station (OSC) do accompany the 1st Respondent to the parcel of land occupied by the Appellant on L.R No. 1160/1047, House No. 3 in Karen within Nairobi County (hereinafter suit property) to enable him recover



vacant possession of the said suit property from the Appellant and surrender the same to Blackstone Properties Limited, the lessor before the lower (hereinafter the 2nd Respondent).

2. The grounds on the face of the motion were amplified in the supporting affidavit deposed by the 1st Respondent, the gist thereof being that on 11.06.2021, he received a letter of instruction from CM Advocates LLP, the 2nd Respondent's advocate (hereinafter the 3rd Respondent) to recover vacant possession the suit property and occupied by the Appellant. That on several occasion, he approached the Appellant to notify him on the intended eviction but he completely refused and ignored to surrender vacant possession to the 2nd Respondent.
3. He went on to depose that the 3rd Respondent had availed a lease agreement and notice to vacate showing the relationship between the 2nd Respondent and the Appellant whereas the 3rd Respondent had served the Appellant with notices dated 02.03.2021 and 22.04.2021 to surrender vacant possession of the suit property, both of which were copied to the National Police Service. It was deposed that there was no indication of the Appellant vacating the property therefore the affidavit was made in support of the motion under the Auctioneers Act, Rule 9(1)a-c(2) of the Auctioneers Rules, to grant him assistance to escort him to the suit property occupied by the Appellant in the presence of the OSC Karen Police Station or any other officer above the rank of Assistant Inspector under his command to provide security to enable him recover vacant possession of the property and render the same to the 2nd Respondent.
4. The motion was equally support by a further affidavit dated 26.07.2021 sworn by Wilfred O. Lusi, who cited being a partner with the 3rd Respondent having conduct of the matter on behalf of the 2nd Respondent. The gist of his deposition being that the Appellant's lawful occupation of the 2nd Respondent's suit property long terminated upon default of the agreements dated 31.08.2018 and 26.09.2019. It was further deposed that it is not in dispute that the Appellant has on several occasions confirmed willingness to vacate the premises, which undertaking to vacate remained deliberately dishonored, worse still the Appellant threatened to remove fixtures and fittings warranting instruction to auctioneers. That the 2nd Respondent having issued notice to vacate on or before 21.06.2021, the amount of rent due from the Appellant has double pursuant to Section 14 of the Distress for Rent Act to the prejudice of both parties. In summation, he deposed that the solitary legal question obtaining is whether it is reasonably just to grant the auctioneers an order for police assistance or not.
5. The Appellant opposed the 1st Respondent's motion by way of notice of preliminary objection (PO) dated 27.07.2021 and grounds of opposition of even date as well as a replying affidavit dated 04.08.2021 and an affidavit in response to the 3rd Respondent's further affidavit of even date.
6. The 1st Respondent's motion was orally disposed of and vide a ruling delivered on 20.08.2021, the trial Court allowed the Respondent's motion meanwhile dismissed the Appellant's preliminary objection (PO).

The Appeal

7. Aggrieved with the outcome, the Appellant preferred the instant appeal challenging the finding by the lower Court premised on the following grounds in its memorandum of appeal as itemized hereunder: -
 - “ 1. The honorable Court erred in law and in fact in granting orders for eviction and vacant possession to the Applicant via a Miscellaneous Application without a plaint or proper action before the Court, thereby misapprehending the law.



2. The honorable Court erred in law and fact in finding that it had jurisdiction to hear and determine a matter as a civil claim despite the fact that matter fell under the purview of the Environment and Land Court.
 3. The honorable Court erred in law and fact in failing to make a finding and or finding that it had the pecuniary jurisdiction to hear and determine the matter.
 4. The honorable Court erred in law and fact in finding that the Auctioneers can legally approach the Court via a Miscellaneous Application to procure vacant possession against a lessee without first obtaining a decree or a court order for eviction of a lessee.
 5. The honorable Court erred in law and fact in failing to make a finding on whether there was accrued rent arrears which would have been the basis to give orders for eviction.
 6. The honorable Court erred in law and fact in by ignoring the binding High Court authorities submitted by the Appellant.
 7. The honorable Court erred in law and in fact by failing to consider various documents and submissions filed by the Appellant.
 8. The honorable Court ruling and order was against the weight of evidence on record. (sic)
8. In light of the aforecaptioned itemized grounds, the Appellant seeks before this Court orders to the effect: -
- a) The appeal be allowed, the honorable Court do set aside the ruling on the preliminary objection dated 27th July, 2021 and consequently in its place strike out the 1st Respondent's application for lack of jurisdiction.
 - b) The honorable Court do and hereby set aside the ruling and consequential orders of the ruling given by the honorable Principal Magistrate in Nairobi Milimani CMCC Misc. Application No. E986 OF 2021 on 23rd August, 2021
 - c) Costs be awarded to the Appellant.
 - d) Any other alternative relief the honorable Court may deem fit to grant." (sic)
9. Directions were taken on disposal of the appeal by way of written submissions of which parties had an opportunity to highlight meanwhile this Court has duly considered the same.

Submissions

10. Counsel for the Appellant anchored his submissions on the decision in *United India Insurance Co. Ltd & Another v East African Underwriters (Kenya) Ltd* [1982-88] 1 KLR as cited in *County Government of Kakamega v Ufanisi Freighters (K) Limited Trawlers Ltd* [2018] eKLR on the duty of this Court as a first appellate Court meanwhile proceeded to collate the Appellant's grounds of appeal on two (2) cogent issues for the Court's consideration. Addressing the Court on whether the Magistrate's Court was right in granting eviction orders in a miscellaneous matter, counsel cited Rule 9 of the Auctioneers Rules and the decision in *Celestine Nzioki v Lucy Ntinyari* [2019] eKLR to submit that the learned Magistrate granted the said order per incuriam whereas orders in an application seeking



- police assistance always contain a phrase “this is not an eviction order” however the one procured by the 1st Respondent did not contain the said phrase. It was further submitted that a suit is necessary to determine the rights of the parties in an eviction claim therefore no eviction nor vacant possession order could issue through a miscellaneous application under Rule 9 of the Auctioneers Rules.
11. Concerning whether the Magistrates Court had exclusive and pecuniary jurisdiction to hear the motion, counsel cited Section 7 of the Magistrates Court Act and the decision in Phoenix of EA Assurance Co. Ltd v S.M Thiga t/a Newspaper Services [2019] eKLR to submit that the Appellant was being evicted from a house he had entered into an agreement to purchase at USD 1,050,000 which was above and beyond the Kshs. 20,000,000/- pecuniary jurisdiction of the Magistrates Court. As to exclusive jurisdiction, counsel relied on the decision in Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & Others [2012] eKLR to posit that the trial Court as invited by the 1st Respondent could not hear and determine an application seeking vacant possession and eviction of a tenant or part owner of a property as a civil case. That the jurisdiction the 1st Respondent invoked was civil and not jurisdiction in respect of an environment and land matter before the Magistrates Court. That it was equally not clear whether the honorable Magistrate was gazetted to hear environment and land matters.
 12. Moreover, by reading of Section 26(3) & (4) of the *Environment and Land Court Act*, certain Magistrate Courts can hear land matters however their jurisdiction is invoked by the matter being filed as an Environment and Land Case (ELC) so that an appeal arising therefrom can be filed before Environment and Land Division of the High Court. It was further submitted that the matter having been heard as a civil case, the honorable Magistrate did not have exclusive jurisdiction to consider the application to procure vacant possession from the disputed suit property. The decision in Charles Maina Wambugu v Tsuyoshi Yoshino [2020] eKLR was cited in the forestated regard. In conclusion, the Court was urged to find that the trial Court lacked the pecuniary and exclusive jurisdiction to hear and determine the matter.
 13. On the part of the 1st and 2nd Respondent, counsel equally identified two (2) issues for the Court consideration. On whether this Court has jurisdiction to entertain the instant appeal, counsel cited the decision in Samuel Kamau Macharia (supra), the provisions in Section 13(1) & (4) of the *Environment and Land Court Act* and Article 162 of *the Constitution* to posit that, in the instant appeal it is evident, the Appellant admits in his preliminary objection that the issues canvassed before the trial Court were a preserve of the Environment and Land Court. Therefore, it is evident that the Appellant is abusing the Court process by placing this matter before this Court when he acknowledges that the matter should have been before the Environment and Land Court as such the instant appeal is incompetent having been file in a Court without jurisdiction.
 14. While calling to aid the decision in Jefferson Kalama Kengha & 2 Others v Republic [2015] eKLR, it was argued that this Court equally lacks jurisdiction to transfer the appeal herein to the Environment and Land Court as such the appeal must be struck out for want of jurisdiction. Concerning the trial Court’s lack of jurisdiction to entertain the matter, it was summarily argued that the Appellant failed to evince any material demonstrative of the fact that the honorable Magistrate was not one of the gazetted Magistrates by dint of Section 26(3) & (4) *Environment and Land Court Act* whereas this Court ought to take judicial notice of the Gazette Notice No. 11930 of 08/12/2017 that duly gazetted the honorable Magistrate as one of the Court’s to deal with Environment and Land matters. Counsel reiterated that if this Court were to proceed to affirm that the learned Magistrate had jurisdiction to entertain the matter by virtue of gazettelement to hear Environment and Land matters, it would therefore mean that the instant appeal is incompetent as jurisdiction in respect of an appeal would only lie with the Environment and Land Court division of the High Court. The decisions in Phoenix of EA Assurance



Co. Ltd (supra), Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR and Joseph Muthee Kamau & Another v David Mwangi Gichure & Another [2013] eKLR were called to aid in the forestated regard. On the premise of the forestated, counsel avowed that this Court lacks jurisdiction to entertain the matter or transfer it to the ELC and should therefore down its tools and strike out the appeal with costs.

15. Submitting on whether the appeal is merited, counsel posited that the matter in issue before the trial Court was not an eviction order but an order for police assistance to an auctioneer to render vacant possession. While calling to aid the provisions of Rule 9 of the Auctioneers Rules, Section 152 & 152E of the *Land Act*, it was submitted that the trial Court did not err in arriving at the finding that the 1st Respondent could approach the Court in respect of the orders sought by way of a miscellaneous application as there was no contest on ownership and or that the Appellant has sought any reliefs under Section 152F of the *Land Act*. That on accord of the forestated, the trial Court never misdirected itself on law at any point but strictly adhered to the law as there was no contestations on facts. Further, placing reliance on the decision in Margaret Karwirwa Mwongera v Francis Kofi [2019] eKLR, the provisions of Rule 9 of the Auctioneers Rules as read with Section 23 of the Act & Section 152 of the *Land Act*, the Court was urged to find that the impugned miscellaneous application was properly before the trial Court and that the orders granted were lawfully issued whereas the question of eviction of the Appellant was not before the Court at the time as such the honorable Magistrate could not render himself on the issue. In summation, the Court was urged to either strike out the appeal or dismiss the same with costs.
16. The 3rd Respondent did not file any submissions in respect of the appeal.

Disposition and Determination

17. Here, it would be apt to observe that the instant appeal was disposed of as part of the Judiciary Rapid Result Initiative (RRI) matters. That said, the original lower Court record did not form part of the record before this Court. Nevertheless, the Court has duly considered the Record of Appeal as well as the submissions before it.
18. It is trite that the duty of this Court as a first appellate Court is to re-evaluate the evidence adduced before the trial Court and to draw its own conclusions, but always bearing in mind that it did not have an opportunity to see or hear the witnesses testify. See *Selle and Anor. v Associated Motor Boat Co. Ltd and Others* (1968) EA 123.
19. The Court of Appeal in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR on its part observed 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 re-analyze 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.
20. With the aforecaptioned legal position in mind, at the epicenter of the appeal is the 1st Respondent miscellaneous application before the trial Court and the raft of objections raised in opposition to the same by the Appellant. The trial Court in dismissing the Appellant’s objections and allowing the 1st Respondent motion expressed itself in part as follows: -

“Before me is an auctioneer’s application presented under the Auctioneers Rule 9(1) principally seeking police assistance in carrying out distress for rent against the Respondent.



Upon service filed a preliminary objection for a reply. Both parties filed skeleton submissions. This matter was canvassed orally.

Determination

What is the meaningful interpretation of Auctioneers Rule 9(1) as read with Section 23?

Whether the preliminary objection has merit?

Whether the auctioneer application has merit?

Ordinarily police assistance orders are *ex parte*. It's a part by the auctioneer facing difficulty either in carrying out dispute and or repossession that police assistance is sought and merely so *ex parte* this matter before the Court is one which the lessor seeks eviction as against the lessee.

The involvement of the auctioneers is sanctioned by lessor on that basis the auctioneer/ he filed this application.

I have considered the same, the argument allowed.

Section 152 where eviction has to initiated through statutory process, the lessor may have complied with the requirement of law on notice, the police assistance to an auctioneer to render vacant possession can be made through the miscellaneous application/summary procedure are adopted by auctioneers is therefore correct. In the circumstance I do not find merit on the preliminary objection the side argument on the optional agreement are subject to a separate litigation that the respondent has not invited the Court to deliberate.

The auctioneers' application is noble, it statutory and provided for in law. I find merit and allow the same, the preliminary objection is thus dismissed." (sic)

21. As earlier taken, the 1st Respondent's motion before the trial Court was saliently anchored on Section 152E (1) & (2) of the Land Act as read with Rule 9(1) & (2) of the Auctioneers Rules, the latter of which provides that:

- (1) Where an auctioneer has reasonable cause to believe that—
 - (a) he may have to break the door of any premises where goods may be seized or repossessed; or
 - (b) he may be subject to resistance or intimidation by the debtor or other person; or
 - (c) a breach of the peace is likely as a result of seizure, repossession or attempted seizure or repossession of any property, the auctioneer shall request for police escort from the nearest police station in order to carry out his duties peacefully.
- (2) An application under this rule shall be by motion by way of a miscellaneous application support by an affidavit and may be heard *ex parte*.

22. With the former providing that: -

- (1) If, with respect to private land the owner or the person in charge is of the opinion that a person is in occupation of his or her land without consent, the owner or the person in charge may serve on that person a notice, of not less than three months before the date of the intended eviction.
- (2) The notice under subsection (1) shall—
 - (a) be in writing and in a national and official language;



- (b) in the case of a large group of persons, be published in at least two daily newspapers of nationwide circulation and be displayed in not less than five strategic locations within the occupied land;
- (c) specify any terms and conditions as to the removal of buildings, the reaping of growing crops and any other matters as the case may require; and
- (d) be served on the deputy county commissioner in charge of the area as well as the officer commanding the police division of the area.

23. It would be pertinent to note that the Appellant's PO before the trial Court took issue with the motion on grounds: - that the 1st Respondent's motion for orders for vacant possession/eviction was fatally defective and incompetent since the same was filed without a plaint and therefore had no legs to stand on; that the trial Court lacks jurisdiction to hear and determine the matter for reasons that the orders for vacant possession sought can only be granted by the Environment and Land Court; that the trial Court lacked the pecuniary jurisdiction to hear and determine the matter; and that the *Auctioneers Act* and Auctioneers Rules do not give Auctioneers powers to seek vacant possession but only distress for rent upon application to the Court. It would appear further from a perfunctory perusal of the grounds in opposition and replying affidavit equally filed in opposition to the 1st Respondent's motion, the same augmented the PO on with the former on legal grounds and latter on factual grounds.
24. With the above in reserve, in the Court's view, this appeal turns on the question whether the lower Court properly exercised its discretion in allowing the 1st Respondent's motion on the backdrop of the preliminary contestations raised by the Appellant. It must be noted that such discretion exercised by the trial Court must be performed judicially and upon reason, rather than arbitrarily or capriciously. See Court of Appeal decision in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR.
25. That said, as to what constitutes a PO, the same was reasonably settled by the Court in *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, wherein Law JA stated:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

See also; *Oraro v Mbaja* [2005] KLR 141, *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR and *Mulemi v Angwenye & Another (Civil Appeal 170 of 2016)* [2021] KECA 214.

26. Notably, the Appellant's grounds in support of the appeal appear in part to be iterations of the PO before the trial Court. Nevertheless, what this Court garners, alongside other preliminary queries in limine, the Appellant's objection concerned the jurisdiction of the trial Court to entertain the said proceedings. Ordinarily in a proper case, an objection appertaining jurisdiction constitutes a pure point of law. The words of Nyarangi. JA, in the locus classicus decision in *Owners of the Motor Vessel*



“Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1 require no restatement save for the exhortation which still endures that “Jurisdiction is everything. Without it, a court has no power to make one more step.” Further, as accurately argued by the Appellant, it is well trodden that 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.

27. At this juncture, this Court purposes to address at the outset the question of jurisdiction, both pecuniary and exclusive, as argued by the respective parties. As submitted by the 1st and 2nd Respondent, a finding on the forestated would inescapably have a bearing on the competency of the proceedings before this Court therefore prudence would dictate that this Court addresses itself to the issue.
28. Thus, to answer the question of exclusive jurisdiction, the Appellant has argued that Magistrate Courts can hear land matters however their jurisdiction is invoked by a matter being filed as an environment and land case (ELC) so that an appeal arising therefrom can be filed before the Environment and Land Division of the High Court. Further, the matter was presented as a civil claim and not a land matter therefore it was not clear whether the honorable Magistrate was gazetted to hear Environment and Land matters in order to entertain the 1st Respondent’s application. The 1st and 2nd Respondent in retort cited that the Appellant failed to evince any material demonstrative of the fact that the honorable Magistrate was not one of the gazetted Magistrates by dint of Section 26(3) & (4) of the *Environment and Land Court Act* whereas this Court ought to take judicial notice of the Gazette Notice No. 11930 of 08/12/2017 that duly gazetted the honorable Magistrate as one of the Court’s to deal with Environment and Land matters. Glaringly, despite there being an objection by the Appellant before the trial Court, specifically challenging the honorable Magistrate’s lack of jurisdiction to hear and determine the matter for reasons that the orders for vacant possession sought by the 1st Respondent could only be granted by the Environment and Land Court, in his ruling, the learned Magistrate failed to address himself to issue.
29. Nevertheless, Section 26(3) & (4) of the *Environment and Land Court Act* provides that: -
 - (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*.
30. Which then begs the question? Was the trial Court gazetted as a Court to hear Environment and Land matters, the 1st and 2nd Respondent have fairly contended that no evidence was advanced to the contrary by the Appellant meanwhile this Court ought to take judicial notice of the Gazette Notice No. 11930 of 08/12/2017 which captures the trial Magistrate as one of the Magistrates gazetted to hear land matters. Further, the Appellant’s argument that the manner in which the matter before the trial Court was presented, exuded an ordinary civil claim and not a land matter does no warrant any merit, in this Court reasoned deduction. Having taken judicial notice of the Gazette Notice No. 11930, as urged on by the 1st and 2nd Respondent, on the face thereof of the motion by the 1st Respondent, it clearly invokes provision of the *Land Act*, it would thus appear administratively, the lower Court



for all intents and purposes, appropriately placed the matter before the learned Magistrate who was duly gazetted as a Court that could hear and determine environment and land matters. Therefore, the Appellant's contestation as to the manner the pleadings were presented before the trial Court give the impression of semantics and is purely a technicality intent on defeating the edicts of Article 159(2)(d) of *the Constitution* as read with Section 1A, 1B & 3A of the *Civil Procedure Act*.

31. As to the question of pecuniary jurisdiction, the Appellant has argued that the motion before the trial Court sought to evict him from a house he had entered into an agreement to purchase at USD 1,050,000, which was above and beyond the pecuniary jurisdiction of the Magistrates Court. Here, the 1st and 2nd Respondent, did not advance any discernible riposte to the Appellant's contestation both before the trial Court and this Court. Section 7 of the Magistrates Court's Act provides that; -

- (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —
 - (a) twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) ten million shillings, where the court is presided over by a principal magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
 - (e) five million shillings, where the court is presided over by a resident magistrate.

32. A review of the above provision as read with Section 26(3) & (4) of the *Environment and Land Court Act*, as at delivery of the impugned decision, the learned Magistrate was designated as a Principal Magistrate. Accordingly, by dint of statute he could only preside over matter that the subject matter did not exceeding ten million shillings. Thus, in order to answer the query, the Court must interrogate what constituted the subject matter before the trial Court? Palpably what was sought for, was police assistance to accompany the 1st Respondent, to enable him recover vacant possession of the suit property from the Appellant and surrender the same to the 2nd Respondent pursuant to the provisions of Section 152E (1) & (2), 152G (1) of the *Land Act* and Rule 9(1) & (2) of the Auctioneers Rules. The issue before the trial Court did not appertain a question of ownership, rights and or disposition in respect the suit property to wit the 1st Respondent's motion may have been caught up by pecuniary jurisdiction. Accordingly, the challenge on pecuniary jurisdiction is of no moment here.

33. A finding on both question of exclusive and pecuniary jurisdiction as set out above would therefore obtain that the trial Court was vested with jurisdiction to entertain the 1st Respondent's motion that undoubtedly related to an Environment and Land matter. The latter which brings to fore the 1st and 2nd Respondent's contestation on whether this Court is the appropriate forum to canvass the Appellant's appeal. Hence, on whether the forestated objection can sustain, the Court of Appeal in *Kenya Port Authority v Modern Holding [2017] eKLR* cited with approval the High Court decision in *Adero Adero & another v Ulinzi Sacco Society Ltd [2002] eKLR* wherein it was observed that: -

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:



“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard.”

34. To wit, Section 26(5) of the *Environment and Land Court Act* provides that: -

Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court.

35. Therefore, on the backdrop of this Court earlier finding that the trial Magistrate was sitting as an environment and land Court, by dint of Section 26(5) as read with Section 13(4) of *Environment and Land Court Act*, the same would dictate that a party aggrieved by any decision emanating from the trial Court sitting as an Environment and Land Court ought to file its requisite appeal before the Environment and Land Court of the High Court. As is, the appeal as presented is incompetent for want of jurisdiction. Any question canvassed in respect of Section 152E & 152F of the *Land Act* as read with Rule 9(1) & (2) of the Auctioneers Rules as to whether the 1st Respondent could obtain eviction and or vacation orders by way of a miscellaneous application would be best canvassed before the Environment and Land Court. To the foregoing end, mutatis mutandis, the Court of Appeal in Phoenix of E.A. Assurance Company Limited (supra), succinctly put it that:

“...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.”

36. This Court reasonably believes it has sufficiently addressed itself to the preliminary issues arising from the instant appeal with the result that the instant appeal is non-starter for want of jurisdiction.

Determination

37. Consequently, on accord of the forestated, the appeal herein is one liable to be struck out. Accordingly, the same is struck out with costs.

- i. This Appeal is struck out.
- ii. Costs are awarded to the 1st and 2nd Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF NOVEMBER, 2024

ROA 14 DAYS.

HON. T. W. OUYA

JUDGE

For Appellant.....na

For Respondents.....olala

Court Assistant.....martin

