



Kioko v Kavoi (Civil Appeal 148 of 2018) [2024] KEHC 4859 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4859 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL 148 OF 2018

FR OLEL, J

MAY 9, 2024

BETWEEN

URBANUS KIOKO APPELLANT

AND

MUTHUI KAVOI KATHUKU ALIAS MUTHIO KAVOI RESPONDENT

*(Being an appeal from the judgment of Hon. I.M. Kabuya (SRM)
dated 8th November 2018 in Machakos CMCC No. 134 of 2014)*

JUDGMENT

A. Introduction

1. The Appellant herein was the Plaintiff before the Trial court where he had sued the Respondent seeking for several orders namely;
 - a. An order compelling the Defendant to hand over the card for commercial plot No 0753 to the plaintiff to enable the plaintiff transfer the same to his name.
 - b. An order of injunction directed against the Defendant jointly or severally by herself or her collective or several agents or servants from disposing or in any manner dealing with the card and commercial plot No 0753.
 - c. General damages, costs and interest at court rates.
2. The respondent filed her statement of defense and counter claim dated 25.07.2012 where she traversed all the averments made in the plaint. She further stated that she had earlier sold the commercial plot No 0753 to one Titus J Ndambuki in 2010, before entering into a transaction to sell 10 acres of land to the Appellant and therefore he had no right to demand for the commercial plot. She did file a counterclaim where she reiterated that she had sold to the Appellant 10 acres and not 10.8 acres. She therefore prayed that the 0.8acres be reversed back to her as the Appellant was not entitled to the same.



3. The parties and their witnesses were heard and the trial Court delivered judgment on 8.11.2018 wherein the Appellants claim was dismissed. The court also dismissed the counter claim filed by the respondent. Dissatisfied by this judgment, the Appellant lodged this Appeal on 14.11.2018 based on the following grounds, that;
 - a. The Learned Magistrate erred in law and in fact in holding that the 2nd agreement superseded the 1st agreement when the agreements are clear that was not the intention of the parties.
 - b. The Learned Magistrate erred in law and in fact in re writing the agreements produced in court contrary to the rules of contract.
 - c. The Learned Magistrate erred in law and in fact by considering extraneous factors which were not material to the case.
 - d. The Learned Magistrate erred in law and in fact in wholly relying on the evidence and arguments advanced by the Respondent and wholly disregarding the arguments by the Plaintiff.
 - e. The Learned Magistrate erred in law and in fact by wholly disregarding submissions tendered by the Appellant before arriving at her decision.
 - f. The Learned Magistrate erred in law and in fact in dismissing the Appellant's submission effectively locking out the Appellant from the seat of justice.
 - g. The Learned Magistrate erred in law and in fact in meting out a decision that was extremely harsh to the Appellant without having due regard to intervening factors and circumstances before her.
4. The Appellant thus prayed that the judgment of the trial court be set aside and his claim be allowed with costs.

B. Facts at Trial

5. The Appellant testified as PW1 and relied on and adopted his witness statement dated 22.06.2012 as his evidence in chief. He stated that on 04.02. 2012 he did purchase Konza shares membership Number 361 of Konza Ranching and Farming Co-operative Society limited from the respondent for a consideration of Kshs.4,700,000/=. This agreement was witnessed by several members of the said co-operative society and the purchase price was for the share number and all rights accruing therefrom. On 06.022012, they went before an advocate and the agreement was reduced into writing and the seller acknowledged the payments made.
6. On 10.05.2012 the society conducted balloting wherefrom membership share No 361 was allocated commercial plot No 0753 and Agricultural plot No 0797. The respondent proceeded to give him the card of the Agriculture plot but for reasons known to herself refused to handover the card of the commercial plot which she retained. Later on he realized that he had not been given full value of the shares bought. He conducted investigations and discovered the share included a commercial plot and therefor prayed that the said commercial plot be transferred to him.
7. Upon cross examination, he stated that he bought membership number 361 so the rights thereon accrue to him. He was not aware if the respondent had only 1 share, all he knew was that he was entitled to what would come out of that share after balloting. He denied that his entitlement was only 10 acres. It was his belief that the commercial plot which he was not given was part of share 361. He said he was aware that 1 membership equal 10 shares but it did not mean that 10 shares equal 10 acres of land.



Upon re-examination, he said he purchased the membership number and that one membership card is equal to 10 shares at Konza.

8. PW2 Dominic Munyao adopted his witness statement filed on 08.09.2015 as his evidence and further stated that he was a witness to the sale transaction between the Appellant and the respondent. He said that the Appellant was entitled to all the proceeds accruing from the same share number. Upon cross examination, he stated that the Appellant bought the share which is also his land but he did not know how much land was under the share bought. In re –examination, he repeated the same sentiment that the Appellant bought share number 361 which did not indicate land allocated to it.
9. PW3, Kenneth Maundu also adopted his witness statement filed on 08.09.2015 and further stated that the respondent was his aunty and she had sold some share to the Appellant through a transaction carried out in an advocates firm. Later on balloting was done and the Appellant was only given the agricultural land which was bigger but not the commercial plot. Upon cross examination, he stated that the respondent was his mother's sister and confirmed that the Appellant bought shares, not land. He did not know how many shares were awarded to one member and he did not know why the Appellant was not given the commercial plot.
10. DW1 Priscilla Kevoi Kathuku who adopted her witness statement filed on 07.06.2014, wherein she stated that she was a member of Konza ranching and farming cooperative society and had initially purchased her share therein for Ksh2,000/=. She held membership No 361 and initially when the cooperative society sub divided the land, she got 12 acres of land and a plot during the 1st lot. Later a further sub division was done and she was given another 12 acres under the same membership Number. In total she had 24 acres and one plot. She sold 2 acres to her nephew one Muange Ngui, which agreement was not reduced into writing and later in October 2010 sold the commercial land to Titus Ndambuki. This plot was later given plot Number 0753.
11. In December 2011, she also sold another commercial plot to Francis Njaramba, before finally selling 10 acres to the Appellant in February 2012. The land sold to the Appellant was agricultural land only and they did sign an agreement before an advocate and in the presence of other witnesses. All the parcels of land were held under her share No 361 and by the time balloting was done both commercial plots had been sold. The only thing remaining was her home and the land sold to the Appellant. The one share in 361 was an affiliation of so many single plots and the Appellant could not have acquired any other interest in all the plots affiliated to the said share 361, other than for the plot acquired, which was 10 acres. The other plots had been sold earlier and were not available and she could also not sell her entire share in share 361 as it constituted her home too.
12. In cross examination, DW1 stated that she was given 24 acres and a plot after sub division and could not recall signing or affixing her thumb print anywhere nor signing the agreement with the Appellant. Whenever she was to sell land, her daughter Grace and neighbor Titus Ndambuki would always be around her. She said she sold the commercial plot to Titus Ndambuki before sub division was effected and that the Appellant was aware that she had sold other portions to other buyers apart from him. The Appellant did not pay her for some 2.5 acres in his possession and she did not recall having a witness during this transaction with the Appellant. It was her testimony that she sold Titus Ndambuki 2 acres of land at Kshs.200,000/= only.
13. DW2 Grace Nduku adopted her witness statement filed on 27.06.2018 and stated that her mother sold one share of Konza ranch 361 to the Appellant before balloting had been done. She had also sold 2 acres of the commercial property to Titus Ndambuki. She told the court that the one share had over 20 acres of land and that is how her mother was able to sell from her 1 share to Titus Ndambuki and Urbanus Kioko and would thereafter remain with 10 acres after these transactions.



14. Upon cross examination she stated that she was present when the agreement was drafted and it stated that her mother sold membership share no.361 to the Appellant and not 10 acres as stated. She was also present when Titus Ndambuki bought the commercial property. It was her testimony that her identity card number on the agreement was 10115087269 but her actual identity card is 5047269. She denied that the agreement dated 18.10.2010 was forged and that is why her ID number differed. She indicated that she did not have any evidence to show that her mother owned 20 acres under her 1 share of Konza membership.
15. In addition, by the time balloting was done, the 2 acres had already been sold to Titus Ndambuki and 10.8 acres sold to the Appellant. She confirmed that her ID number was in the agreement (Exhibit 1) which indicates that 1 share of membership was wholly sold to the Appellant but she disagreed with the contents of the said agreement because her mother had only intended to sell 10 acres of land. In reexamination she stated that she did not know why her Identity Card number differed in the sale agreement dated 18.10.2010.
16. DW3, Titus Ndambuki adopted his witness statement dated 27.6.2017 and stated that the respondent held one share number 361 at Konza Ranching and farming cooperative society Ltd and attached to the said share number were several properties. 2 acres were sold to him and the respondent dwells on 10 acres. By the time he was buying his parcel of land, balloting had not been carried out to enable them sub divide the land. According to DW3, the 1 share membership had five properties included therein and that he had officially bought his 2 acres on 18.10.2010, while the Appellant and respondent each had 10 acres.
17. Upon cross examination, he stated that balloting was done on 20.02.2012. He confirmed that the report indicates that the members were to get 2 acres for commercial plot and 10 acres agricultural land though the respondent still had 3 other properties not mentioned therein prior to the balloting. He said he had not produced any land ownership document except for the share card produced in court and the agreement dated 18.10.2010.
18. The Appeal was canvassed by way of written submissions.

C Parties Submissions

i. Appellants submissions.

19. The Appellant filed submissions on 23.10 2023 and submitted on five issues. First, as to whether the honourable court has jurisdiction to hear and determine the Appeal, it was submitted that the appeal is based on a sale of shares through a contractual agreement of shares (membership number 361) and not sale of land as alluded to by the Respondent. The said share Number 361 upon balloting created commercial plot no 0753 and Agricultural plot No 0797. The respondent gave the Appellant the latter agricultural plot but failed to give him the card of the commercial plot 0753. The dispute was about sale of shares through a contractual agreement and therefore the court had jurisdiction to handle the matter.
20. Secondly, it was submitted that the Trial Magistrate erred in law and in fact by holding that the 2nd agreement dated 06.02.2012 superseded the 1st agreement dated 4.2.2012, without giving a rationale as to why he gave prominence to the said agreement. The trial Magistrate had also acknowledged ambiguities between the two agreements, but went ahead and interpreted the same as against the appellant without giving a proper basis thereof. It was submitted that in such a case, the court ought to apply contra proferentem rule and interpret the clause against the party that introduced it.



21. The Trial Magistrate further erred in law and in fact by rewriting the contractual agreement as between the parties, which ran contrary to the rules of interpreting contract. Reliance was placed on the cases of South Nyanza Sugar company limited vs Leonard O. Arera [2020] e KLR, Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] e KLR and Hillas & Co vs Arcos Limited [1932].
22. The court was also faulted for considering extraneous factors which were not material to the case. While citing the case of Continental Baking Company vs Katz [1968] it was submitted that during the contractual period, at no time did the Respondent contend that she was selling land but shares. In addition, the learned magistrate erred in finding that other people who had not been mentioned in the initial contract emerged to claim this one share, that had been bought by the Appellant. Their claim (of these third parties) was fraudulent and should not have been allowed.
23. Lastly, it was submitted that the Appellant was entitled to all the rights emanating from the one share number 361 and the two cards emanating therefrom being, one for agricultural plot number 0797 and the other for commercial plot number 07533 and anything contrary to this arrangement would amount to fraudulent misrepresentation.

(ii) Respondents Submissions.

24. The Respondent filed submissions on 11.07.2023 in which it was submitted that this court had no jurisdiction to handle land matters and this appeal ought to have been handled by the High court, Environment and Land court Division. Reliance was placed on section 13(1) and (2) (d) and (e) of the [Environment and Land Court Act](#). It was further submitted that at the lower court, the Trial magistrate had been gazetted by the Honorable the Chief Justice to handle land matters pursuant to section 26 (3) of the [Environment and Land Court Act](#). This appeal had been filed in the wrong court and the court was urged to dismiss the same.
25. As to whether the Appellant is entitled to all the rights from the 1 share under membership number 361 at Konza Ranching and farming Co-operative Limited, it was submitted that it was not contested that the Respondent had been granted membership number 361 and each member had been allocated 10 acres of agricultural plots and 2 acres of commercial plots. DW2 had bought 2 acres of commercial plots in 2010 and his right thereto could not be defeated unless it could be shown that the sale agreement was a forgery. Reliance was placed on the cases of Abok James Odera t/a A.J. Odera 7 Associates vs John Patrick Machira T/a Machira & Co advocates [2013] e KLR, Securicor Couriers (K) Limited vs Benson David Onyango & Another (2008) e KLR.
26. Further, it was submitted that one cannot give what they do not have, and reliance was placed on the maxim *nemo dat quod non habet*. The Respondent could not have sold the two acres of commercial plot in addition to the 10 acres of agricultural plots as by 20212, she had already sold the commercial plot to DW2 and as such she had no proprietary title to pass to the Appellant with respect of this plot. Therefore, the person to blame for this mistake was the advocate and not the parties. Each party to the agreement also knew the intention of the other and accepted it.
27. There was a consensus ad idem between the parties that the Respondent only had 1 share under membership number 361 not 10 shares and that the land which was being sold was measuring 10 acres. There was a meeting of minds between the parties as to the size of land being sold and that was binding as between the parties. This point was buttressed by the case of Eldo City Limited vs Corn Products Kenya & Another [2013] e KLR. Where it was held that parties should be held to contractual terms.



D. Analysis & Determination

28. This court has considered the Trial Court record, the memorandum of Appeal and the grounds raised therein as well as the corresponding submissions of the parties. I must reiterate that this being a first Appeal, this court has a duty to reevaluate and re analyze the evidence noting that it did not have a chance to see or hear the witnesses in the Trial court, As rightly put by the Appellant, this is the duty of the court and has been reiterated in several cases. See *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.

29. The main issues for determination in this Appeal is whether this court has jurisdiction to handle this matter. The subject of jurisdiction is by now well settled by *the Constitution*, the law and legal principles.

Jurisdiction is defined in Halsbury's Laws of England 4th Ed Vol 9 as "...the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.". Black's Law Dictionary, 9th Edition, defines jurisdiction as the court's power to entertain, hear and determine a dispute before it.

30. In Words and Phrases Legally Defined Vol 3, John Beecroft Saunders defines jurisdiction as follows: By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. In the locus classicus case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR. , Nyarangi JA famously stated that:

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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

31. It was the Appellants contention that this suit is simply about interpretation of a contract regarding ownership of share 361 which was owned by the respondent. The respondent counsel on the other hand submits that the issue in contention relates to ownership and use of land. The trial magistrate who handled the primary suit had been gazetted by the chief Magistrate to handle Environment and land matters and any appeal filed as against his Judgement should have been filed at the High court (ELC). This court was therefore bereft of jurisdiction to handle this matter and prayed that it be dismissed with costs.

32. Gazette notice number 5178 on Practice directions on proceedings in the environment and land courts, and on proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other court states as follows;

Jurisdiction in matters relating to the Environment and the use and Occupation of, and Title to Land.

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8. Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the courts have the requisite pecuniary jurisdiction. All proceedings which were pending before the Magistrates Court, having been transferred thereto from the now defunct District Land Disputes Tribunals, shall continue to heard and determined by the same courts.
 9. All cases under the Landlord and Tenants (Shops, Hotels & Catering Establishments) Act Cap. 301 Laws of Kenya shall continue to be filed in and determined by the Business Premises Tribunal.
 10. All cases under the *Rent Restriction Act*, Cap. 296 Laws of Kenya shall continue to be filed in and determined by the Rent Tribunal.
 11. All disputes under the Valuation of *Rating Act*, Cap. 266 Laws of Kenya shall continue to be filed in and determined by the Resident Magistrates Courts of competent jurisdiction.
 12. The National Environment Tribunal shall continue to hear and determine environmental matters in which the Tribunal has jurisdiction as conferred by the Environment Management and Co-ordination Act, (No. 8 of 1999).
 13. Appeals from the Magistrates Courts and Tribunals in the foregoing paragraphs 6 to 12 shall lie in the Environment and Land Court pursuant to Section 13 (4) of the *Environment and Land Court Act*.
33. Article 162 (2) of *the Constitution* establishes the Environment and Land Court, while Section 13 (2) and (4) of the *Environment and Land Court Act* states as follows;
- (2)In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes——
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
34. From the court record, this suit was initially filed as Machakos HCCC 221 of 2012 and a ruling was delivered, wherein the court inter alia noted that the issue the court would seek to establish is what membership No 361 was comprised of, what exactly was sold and whether the Applicant had taken



possession of the commercial plot. Later by consent of the parties the primary suit on was transferred to the Chief Magistrate's court for determination.

35. In this case, it is not in contention that the Appellant and the Respondent entered into some sort of agreement relating to the sale of shares, which would translate to ownership of land with in land Konza Ranching and Farming Cooperative society limited. In the plaint the appellant seeks an order compelling the respondent to hand over the commercial card of plot No 0752 to enable him transfer the same to himself. He also sought for and injunction seeking to stop the respondent and her agents collectively from disposing of the said commercial plot No 0753 plus general damages and interest.
36. It is clear that the Appellants claim, relates to the use, ownership and occupation of land and those are the same issues conversed extensively by both parties during hearing of the main suit and the documentary evidence presented. I find that the issues that arise herein do not fall within the jurisdiction of this court and as such I must immediately down my tools.
37. In the case of Joseph Muthee Kamau & Another Vs David Mwangi Gichure & Ano (2013) 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 Vs Musirambo (1968) E.A 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the courts 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. Also see Pheonix of E.A Assurance company limited Vrs S.M Thiga T/A Newspaper services (2019) eklr

E. Disposition

38. This Appeal is therefore dismissed and given the history of this matter and the fact the parties are neighbors; each party will bear their own costs of the primary case and this appeal.

JUDGMENT WRITTEN, DATE AND SIGNED AT MACHAKOS THIS 9TH DAY OF MAY, 2024

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Team this 9th day of May, 2024

In the presence of: -

No appearance for Appellant

No appearance for Respondent

Sam Court assistant

