



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE NO. 131 OF 2000 (OS)

SYLVANUS OLUNGA MAKUBA.....PLAINTIFF

VERSUS

**ANNA NANJALA SAKWA (Legal representative of Estate of
BONIFASI SAKWA MAKUBA).....DEFENDANT**

RULING

1. The suit herein was filed 1st July 2000. The plaintiff seeks a declaration that he has acquired a right to registration as proprietor of E. Wanga/Malaha/394 on account of adverse possession, having been in continuous occupation of the subject property since 1970, and thereby the interest of the defendant, as proprietor, has become extinguished, and his entitlement to registration as proprietor has accrued.
2. The matter was disposed of by *viva voce* evidence, taken on 27th February 2007, 1st March 2010 and 30th May 2011. Judgment was reserved for 22nd September 2011. Judgment was not delivered on 22nd September 2011, for the file was inadvertently returned to the registry, where it remained until 29th July 2020 when it was placed before me for preparation of judgment.
3. The dispute relates to use, occupation and ownership of property. Following the promulgation of the new Constitution on 27th August 2010, the High Court lost jurisdiction to hear and determine land disputes that turn on the ownership, use and occupation of land. The relevant provisions are in Articles 162(2)(3) and 165(5) of the Constitution. I ask myself, in view of those developments, do I have jurisdiction to determine the dispute?
4. Article 162(2)(3) provides as follows:

“162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).

(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.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).”
5. Parliament passed legislation, the Environment and Land Court Act, No. 19 of 2011, pursuant to Article 162(2)(3) of the Constitution, to establish the court envisaged in Article 162(2) (b), and to set out the jurisdiction of the said court as required by Article 162(3). The preamble to the said Act states its objective to be: -

“... to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land; and to make provision for its jurisdiction functions and powers and for connected purposes.”
6. The scope and jurisdiction of the Environment and Land Court is set out in section 13 of the Environment and Land Court Act, which states as follows:

“13. Jurisdiction of the Court

1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to the environment and land.

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.”

7. Article 165 of the Constitution establishes the High Court and sets out the scope of its jurisdiction. Article 165(5) specifies areas in which the High Court has no jurisdiction, and these include matters that fall under Article 162(2) of the Constitution. The relevant portions of Article 165(5) state as follows:

“(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).”

8. The Land Registration Act, Act No. 3 of 2012, provides for, among other things, registration of land and registration of leases created over properties registered under the Act. The applicant herein argues that he has become entitled to registration as proprietor under the Land Registration Act, of E. Wanga/Malaha/394, which is registrable under the Act. All land in Kenya is subject to the Land Act, No. 6 of 2012. The said legislation deals with administration and management of both public and private land. The effect of this is that E. Wanga/Malaha/394, being private land, is subject to the Land Act. The fact that E. Wanga/Malaha/394 is a property registered under the Land Registration Act and regulated or managed under the Land Act, naturally raises questions about jurisdiction over disputes that may arise over the registration, management and use of E. Wanga/Malaha/394.

9. Sections 2 and 101 of the Land Registration Act, and sections 2 and 150 of the Land Act state the indication of the court with regard to disputes arising with respect to matters concerned by the two statutes.

10. The provisions under the Land Registration Act state as follows:

“Interpretation.

2. In this Act, unless the context otherwise requires— “Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011, No. 19 of 2011.

Jurisdiction of court.

101. The Environment and Land Court established by the Environment and Land Court Act, 2011 No. 19 of 2011 has jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

11. The provisions under the Land Act say:

“2. Interpretation

In this Act, unless the context otherwise requires— “Court” means the Environment and Land Court established under the Environment and Land Court Act, 2011 (No. 19 of 2011).

150. Jurisdiction of the Environment and Land Court

The Environment and Land Court established in the Environment and Land Court Act and the subordinate courts as empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act.”

12. The dispute before me is on land. The principal prayer in the suit is for a declaration that the plaintiff has become entitled to registration as owner of E. Wanga/Malaha/394 on account of adverse possession. The matter also dwells on the application of the Registration of Land Act, especially on the provisions governing registration of land, and use and possession of such land. The dispute that has arisen is over ownership, possession and use of land. The High Court has no jurisdiction over the matter since it turns on ownership, use and occupation of land, which is regulated or administered by the Land Act and registered under the Land Registration Act.

13. Jurisdiction is at the core of exercise of power by a court of law, without it a court ought not move on with a matter. The Court of Appeal, in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, expressly stated, on the matter of jurisdiction, that jurisdiction is everything, and a court without jurisdiction should go no further. The exact words of the court were:

“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.”

14. More recently, the Court of Appeal said as follows, in *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR, on the same subject:

“... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the 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 upon itself ...”

15. In view of the above, there is no jurisdiction in the High Court over the dispute articulated in this case. At the time the suit was filed in 2000, the High Court did have jurisdiction, however, jurisdiction was lost when the new Constitution was promulgated on 27th August 2010. Effective from that date, the High Court ought to have downed its tools over the matter, to await establishment of the court envisaged in Article 16(2), and upon the establishment of that court transfer the matter to that court. That court was established by the Environment and Land Court Act, which commenced on 30th August 2011. The oral hearings of the matter were conducted both before and after the High Court lost jurisdiction on 27th August 2010. The defence case closed on 30th May 2011, and 12th July 2011 is when the court allocated 22nd September 2011 as the date for judgment. That would mean that the defence case was being heard on 30th May 2011 there was no jurisdiction.

16. The Constitution is the supreme law of Kenya. Once it declared on 27th August 2010 that the High Court had no jurisdiction to entertain disputes relating to ownership, use and occupation of land, the High Court lost that jurisdiction, and it ought to have downed its tools right from that date. Any exercise of jurisdiction from that day onwards was in contravention of the Constitution, and cannot stand. Consequently, I have no jurisdiction to prepare and deliver judgment in the matter.

17. Jurisdiction is not a matter of procedure. It is substantive, for it is the foundation for exercise of power or authority by a court. It cannot, therefore, be argued that Article 159 of the Constitution can be applied to save the situation. Jurisdiction is vested by the Constitution or by statute. In this case, the Constitution has taken away the jurisdiction and vested it in another court. A statute was subsequently passed to establish the court to exercise the jurisdiction taken away from the High Court. There is no technicality of procedure arising in the matter, which can be cured by Article 159. In any event, a court cannot confer jurisdiction on itself, where none has been conferred upon it by the Constitution and the relevant legislation.

18. When I mentioned this matter on 4th November 2020 and 2nd December 2020, the parties did not address me on the matter of jurisdiction.

19. Should I transfer the matter to the Environment and Land Court, which has jurisdiction over the dispute? I am aware of the decision of the Court of Appeal, in *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, with respect to exercise of power to transfer suits, filed in a court without jurisdiction, where it was said:

“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 having 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 law 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.”

20. My view, however, is that *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, is of no application in this regard. The suit herein was filed herein when the High Court had jurisdiction. Jurisdiction was lost midstream by operation of the law. In the circumstances, there would be jurisdiction to move the file to the court with jurisdiction, as should have been done after 27th August 2010, and more specifically after 30th August 2011 when the Environment and Land Court Act became effective.

21. In view of everything that I have said above, I hereby declare that the suit herein turns on ownership, use and occupation of land, and I, sitting as a Judge of the High Court, have no jurisdiction to handle it, even in the limited role of preparing and delivering judgment on the dispute at hand. Since the suit was filed at the High Court when the court had jurisdiction, and the same was lost midstream, the suit is not and did not become incompetent, and, therefore, it can be administratively transferred from the registry of the court without jurisdiction to the court which has jurisdiction. Consequently, I do order and direct that the file herein be transferred to the Environment and Land Court at Kakamega for finalization. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 24TH DAY OF MARCH, 2021

W MUSYOKA

JUDGE